1869. Apl 7 – Reversed for want of 6 Jurisdiction in Circuit Court & remanded

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 146.

THOMAS B CODDINGTON, PLAINTIFF IN ERROR,

VS.

EDWIN A. C. HATCH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 29, 1867.

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a UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the Circuit Court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, or some of you, between Edwin A. C. Hatch, plaintiff, and Thomas B. Coddington, impleaded, &c., defendant, a manifest error hath happened to the great damage of the said Thomas B. Coddington, as is said, and as appears by his said complaint. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 3d day of December, in the year of our Lord one thousand eight hundred and sixty-six.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Endorsed: Supreme Court of the United States. Thomas B. Coddington, impleaded, &c., pl'ff in error, *vs.* Edwin A. C. Hatch, def't in error. Writ of error. Owen, Nash & Gray, att'y for pl'ff in error. Filed Oct. 28, '67. Allowed, October 26, 1867. Sam'l Blatchford, district judge, U. S. S. D. of N. Y.

b By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the Circuit Court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the following pages, numbered from one to 146, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the above-entitled case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-cent rev. stamp.]

1 Pleas before the judges of the Circuit Court of the United States for the southern district of New York, at the City-Hall, in the city of New York, of October term, in the year of our Lord one thousand eight hundred and sixty-five.

Witness Honorable Judge Nelson.

KENNETH G. WHITE, *Clerk.*

EDWARD H. C. HATCH, a citizen of the State of Minnesota, pl'ff,
vs.
THOMAS B. CODDINGTON, EDWARD L. SHEARMAN, George L. Nichols, and Henry Nash, defendants.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Be it remembered, that heretofore, to wit, on the tenth day of Nov'r, 1865, in term of October, A. D. 1865, before the 2 judges of the Circuit Court of the United States for the southern district of New York, at the city hall, in the city of New York, came Edwin A. C. Hatch, by Edward H. Hawke, his attorney, and brought into the said court, before the aforesaid judges thereof, his certain bill against the said Thomas B. Coddington, Edward L. Shearman, George L. Nichols, and Henry Nash, being in custody, &c. of a plea of trespass on the case, which said bill follows in these words:

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

The above-named plaintiff, by Edward H. Hawke, his attorney, complains of the defendants in a plea of trespass on the case.

For that whereas the plaintiff heretofore, to wit, on the 13th day of May, 1859, was lawfully possessed as of his own property, of forty-five bonds as acknowledgments of indebtedness made and issued by the State of Minnesota for one thousand dollars each, dated the 3d day of Feb'y, 1859, and payable on the 1st day of Dec'r, 3 1883, to the order of the Minnesota & Pacific Railroad Company, and by them endorsed to bearer, with interest at seven per cent., payable semi-annually on the first of June and December of each year, of great value, to wit, of the value of seventy-five thousand dollars; and being so possessed thereof, he, the plaintiffs, afterwards, to wit, on the day and year aforesaid, casually lost the said forty-five bonds or acknowledgments of indebtedness out of his possession, and the same then came to the possession of the defendants by finding. Yet the defendants, well knowing the said bonds or acknowledgments to be the property of the plaintiff, but contriving and intending to injure the plaintiff in this behalf, have not as yet delivered the said bonds or acknowledgments of indebtedness, or either of them, to the plaintiff, although often requested so to do, and afterwards, to wit, on the day and year aforesaid, con-

verted and disposed of the said bonds or acknowledgments of
4 indebtedness to their, the defendant's, own use, to the plaintiff's damage of eighty thousand dollars, and therefore he brings his suit, &c.

EDWARD H. HAWKE, *Pl'ff Att'y.*

United States Circuit Court for the southern district of New York.

Edwin A. C. Hatch, plaintiff,
vs.
Thomas B. Coddington, impleaded, &c., def't.

And the said defendant, Thomas B. Coddington, impleaded with Edward L. Shearman, George L. Nichols, and Henry Nash, by Spear & Nash, his attorneys, comes and defends the wrong and injury, which, &c., and says that the defendants are not guilty of the said supposed grievances above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said
5 plaintiff hath above thereof complained against them.

And of this the said Francis B. Coddington, impleaded as aforesaid, puts himself upon the country, &c.

SPEAR & NASH,
Att'ys for defendant, Thomas B. Coddington.

And the plaintiff, as to the said plea of the said defendant, Thomas B. Coddington, impleaded, &c., whereof he, the said defendant, hath put himself upon the country, doth the like, &c.

EDWARD H. HAWKE,
Plaintiff's Att'y.

Therefore the issue above joined is ordered by the said Circuit Court to be tried at a stated term of the said Circuit Court, appointed to be held at the city hall of the city of New York, within and for the southern district of New York, on the third Monday of October, in the year of our Lord 1865.

And now, on this 10 day of November, in the year of our
6 Lord 1865, before the judges of the said Circuit Court of the United States for the southern district of New York, comes the said plaintiff and defendant, Thomas B. Coddington, by their respective attorneys within named; and the persons of the jury being duly summoned to try the said issue, also come, who, to speak the truth of the matters within contained, being duly chosen, tried, and sworn, say that they cannot agree upon a verdict; whereupon, by and with the consent of the attorneys aforesaid, they, the said jurors, were duly discharged by the court.

And because of the disagreement of the jurors, as aforesaid, the process between the parties aforesaid is continued to a stated term of the said Circuit Court of the United States for the southern district of New York, appointed to be held at the place aforesaid on the first Monday of April, in the year of our Lord 1866.

And now, on the 10th day of April, in the term of April, 1866,
before the judges of the said Circuit Court of the United
7 States for the southern district of New York, comes the parties aforesaid, by their respective attorneys aforesaid; and
the jurors of the jury, being duly summoned to try the said issues,
being called, also come, who, to speak the truth of the matters
within contained, being chosen, tried, and sworn, say, upon their
oaths, that the said defendant, Thomas B. Coddington, is guilty of
converting and disposing to his own use the said forty-five bonds of
the plaintiff, of one thousand dollars each, with interest, as in the
plaintiff's declaration mentioned and complained against him, and
assess the plaintiff's damages on the basis of sixty (60) cents on the
value of forty-five thousand (45,000) dollars, with interest, from the
seventh day of May, 1850, to wit: the sum of twenty-seven thousand
(27,000) dollars, with interest thereon from day and year last aforesaid, over and above his costs and charges by him about his
8 suit in this behalf expended. Therefore it is considered that
the said plaintiff do recover against the said Thomas B. Coddington the said sum of twenty-seven thousand dollars, nine hundred
and seventy dollars and fifty cents, in the aggregate forty-two
thousand nine hundred and seventy dollars and fifty cents, his
damages aforesaid by the jurors aforesaid assessed; and also the
further sum of three hundred and forty dollars and fifty cents for his
costs and charges by the court now here adjudged of increase to said
plaintiff, and with his assent, amounting in the aggregate to the sum
of forty-three thousand three hundred and eleven dollars.

Judgment signed this 19th October, 1867.

R. E. STILWELL,
Dep. Clerk.

9 Endorsed: U. S. Circuit Court for the southern district of N. Y. Edwin A. C. Hatch *vs.* Thomas B. Coddington, impleaded, &c. Judgm't record. E. H. Hawke, pl'ff's att'y, 7 Wall st. Filed Cct. 19, 1867.

10

11 U. S. Circuit Court, southern district of New York.

THOMAS B. CODDINGTON
impleaded, &c.,
ads.
EDWIN A. C. HATCH.

Afterwards, to wit, at a Circuit Court of the United States for the southern district of New York, held at the united court-room, in said district, on the 12th day of April one thousand eight hundred and sixty-six, before the honorable Samuel Nelson, the aforesaid issue so joined between the said parties, as aforesaid, came on to be tried by a jury of the said district for that purpose duly impannelled.

At which came there, as well the said plaintiff, as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid empannelled to try the said issue being called, also came and were then and there, in due manner, chosen and sworn to try the said issue. And the counsel for the plaintiff, to maintain and prove the said issue on his part called James K. Aymar, who, being sworn, testified as follows:

12 In 1860, I was clerk in the law office of Barbour, Lee & Smidt, in New York City. I know the defendant Coddington, and called at his office, 76 Broad street, in said city, and demanded delivery of forty-five bonds of the State of Minnesota, at the request of Judge Barbour; at the same time I showed him these papers.

For value received, we, the Minnesota & Pacific Railroad Company, hereby sell, assign, transfer, and set over to Selah Chamberlain and his assigns, forty-five bonds for one thousand dollars each, issued by the State of Minnesota to us, and now in the hands of Thomas B. Coddington & Co., of the city of New York, and authorize and empower him to have and receive the same. In witness whereof we have caused these presents to be signed by our president, Edmund Rice, and attested by our secretary, James W. Taylor, and our corporate to be thereto affixed, this 13th day of May, in the year one thousand eight hundred and fifty-nine.

[SEAL.] EDMUND RICE, *President*.

Attest:

JAMES W. TAYLOR, *Secretary*.

St. Paul, May 13th, 1859.

In value received, I hereby assign, transfer, and set over unto Edwin A. C. Hatch the forty-five Minnesota State R. R. bonds, at the denomination of one thousand dollars each, now in the hands of T. B. Coddington & Co., of the city of New York, and all my
13 right, title, and interest therein, being the bonds issued to Minnesota & Pacific Railroad Company, and transferred by said company to me.

S. CHAMBERLAIN.

ST. PAUL, MINNESOTA, *Dec.* 12*th*, 1859.

Messrs. J. B. Coddington & Co., New York City.

GENTLEMEN: Please deliver to Hon. John M. Barbour the forty-five Minnesota State railroad bonds described in the annexed assignment, and oblige yours respectfully,

EDWIN A. C. HATCH.

Mr. Coddington, in reply, refused to deliver the bonds, stating that there had been a judgment against the Minnesota & Pacific Railroad Company for which these bonds were ordered to be sold. I did not get the bonds.

On cross-examination, witness testified: I made a memorandum at the time which I read as follows: New York, October 30th, 1860. Called on Mr. T. B. Coddington, at his office, No. 76 Broad street, and presented the annexed papers to him, which he read, and requested the delivery of the forty-five bonds mentioned therein, which he refused to do, because the referee had decided in his favor in suit against the Co., and directed the bonds to be sold.

JAMES K. AYMAR.

14 The suit referred to had been pending in the office of Barbour, Lee & Smidt. Defendant stated that the referee had decided in his favor in the suit against the company.

William Crooks, who, being sworn, testified as follows· I reside at St. Paul, Minnesota. I know Edmund Rice, James W. Taylor, and Selah Chamberlain, and plaintiff Hatch, and have seen all and each of them write, and am familiar with their handwriting the respective signatures to the assignments produced are genuine. Taylor was secretary of the company from 1857 for three years thereafter. Plaintiff's counsel offered the assignments in evidence. Defendant's counsel objected to the reception of the assignment from the company to Chamberlain, on the ground that Taylor's signature was that of an attesting witness, and that he should be called. The judge overruled the objection, to which decision the counsel for defendant then and there duly excepted. The assignments and the order of plaintiff were then read in evidence.

Witness resumes: I have some knowledge of the value of these bonds.

Q. Had you any knowledge of their value in Minnesota, on the 30th October, 1860?

15 (Defendant's counsel then objected to any evidence of value except in the city of New York; and thereupon the said circuit judge overruled the objection, to which decision of the said circuit judge the said counsel for the defendant did then and there duly except.)

Witness resumes: These bonds were received at par in Minnesota as a basis of banking.

Q. What was their value in Minnesota, on the 21st April, 1859?

(Defendants' counsel objected to any evidence of value before the time plaintiff acquired title, on the ground that the claim for damages must be for the value between the 30th October, 1860, the time of demand and the time of the commencement of this suit, or the time of trial; and thereupon the said circuit judge overruled the objection, stating that if the plaintiff could show the defendant was a tortious holder from the beginning, the first date might apply; that he would take the testimony and give the proper directions; to which decision of the said circuit judge the said counsel for the defendant did then and there except.)

Witness resumes: These bonds were at par, on the 13th of 16 May, 1859, and I believe they are worth par to day; there are perhaps 3 or 4 banks banking upon these securities. Taylor then resided in Minnesota; his family are still there; he is now employed in the Treasury Department, at Washington.

On cross-examination, witness testified: I think I was assistant engineer on the Minnesota & Pacific railroad during the whole month of October, 1859. A portion of the time I was employed by the government in the Surveyor General's office. I am an engineer; had no interest in the stock of this company, or the bonds; I have never bought or sold any of these bonds, nor was ever present at the sale of one. My knowledge of their value consists in knowing of then being used at par for banking purposes; don't know anything as to their value for cash when they were transferred to plaintiff, nor on the 13th May, 1859. The Minnesota & Pacific R. R. Company forfeited to the State; and the rights, privileges, and properties of the company were transferred to the St. Paul & Pacific R. R. Company; I was not present at the transfer, but I know the fact. I saw the act of the legislature giving it to the St. Paul & Pacific Railroad Company.

17 (Counsel for the plaintiff here rested his case.)

And the counsel for the defendant, to maintain and prove the said issue on his part, called William H. Newton, who, being sworn, testified as follows:

In the spring of 1859 I was a director of the Minnesota and Pacific Railroad Company; Edmund Rice was president, and Hatch, the plaintiff, was a director; Selah Chamberlain was a contractor for the company. I was in New York with Rice in April, 1859, negociating for the purchase of iron. I am the subscribing witness to the agreement shown me, executed in my presence in Rice's room, at the St. Nicholas Hotel; the signature appended is that of Mr. Rice. Mr. Coddington's clerk, Douglas, was present besides Rice and I; there was a duplicate of the agreement. Mr. Coddington's copy was taken by Douglas; the other by Mr. Rice. The next day after the papers were exchanged Rice and I left for St. Paul, Minnesota. The agreement was here read in evidence, as follows:

18 Agreement made the twenty-first day of April, 1859, between the Minnesota & Pacific Railroad Company, a corporation created under the laws of the State of Minnesota, and T. B. Coddington & Co., of the city of New York.

The said railroad company agrees to purchase of said T. B. Coddington & Co., who agree to sell to said company one thousand tons of good merchantable railroad iron, at sixty dollars per ton of 2,240 lbs., cash on delivery; and for the purpose of aiding said company in the construction of its road, the said T. B. Coddington & Co. agree to loan and advance to said railroad company sixteen thousand dollars, for which they are to execute their promissory note or notes, payable at six months, with interest at seven per cent.

The said railroad company agrees to deposit with said T. B. Coddington & Co., forthwith, eighty-five thousand dollars of Minnesota State seven per cent. bonds now belonging to said company, as a security for said loan, and for the performance of this contract by said company; and the said T. B. Coddington & Co. are hereby authorized to negotiate and make sales of said bonds, or to use the same for the purchase of iron, and are to account to said company for said bonds, or the cash proceeds of any of them, sold upon the matu-

rity of the note or notes given for said loan, or as soon there-
19 after as the same may have been sold. The said iron is to be of the Erie pattern, to weigh from 57 to 58 lbs. to the lineal yard, and to be deliverable to the said company in the city of New York on or before the first day of July next, free of duty, freight, and all other charges, on being paid for by said company. In case the said company shall not be prepared to receive and pay for the said iron when it shall be ready for delivery in New York, all subsequent charges for storage, &c., on said iron shall be at the expense of said company.

The said T. B. Coddington & Co. shall have the option to store the same, or to forward it to Milwaukie or St. Paul, at the risk and charge of said company, and to retain the title of the same till the said company shall receive and pay for it at the place to which it shall be forwarded.

If the said T. B. Coddington & Co. shall [shall] purchase iron with the said bonds, whatever excess above the cash price shall be paid for the iron so purchased shall be allowed in accounting for said
20 bonds as a discount from the par value of the same.

In the event of T. B. Coddington & Co. having to pay any greater amount of duty upon said iron than the present tariff of 24 per cent. upon the price of £6 10s. per ton, the said additional duty is to be added to the contract price of $60 named herein, and the said company agrees to assume and pay the same.

It is hereby further understood and agreed, that should the company be unable to receive and pay for the said iron within four months after the time specified herein for the delivery, or say on or before the first day of November, 1859, T. B. Coddington & Co. may sell the same either at public or private sale, for the account of the said company.

And upon the non-payment, at maturity, of any of the notes given for $16,000, the said T. B. Coddington & Co. may sell at public sale in the city of New York, or elsewhere, the said $85,000 of Minnesota State bonds, or so much of the mas will re-imburse them for said loan and for any deficiency between the amount realized for said iron in such re-sale and the contract price, together with all expenses
21 incurred thereon for the accommodation of the company.

Said T. B. Coddington & Co. may buy at any public sale of said iron or bonds, all or any portion of the same, for their own account, provided public notice of said sale be first given in three daily papers of the city of New York for at least two weeks before such sale.

The said T. B. Coddington & Co. have the privilege of furnishing one thousand tons more of said iron at the same price, and deliverable upon the same terms, within the present year; and after the first day of August next the weight per lineal yard to be not less than 52 nor more than 58 pounds, and another thousand tons weighing not less than fifty nor more than fifty-eight lbs. per yard, deliverable in the spring of 1860, provided they shall give notice of such option by letter, addressed to the president of said railroad company at St.

Paul, and duly mailed at New York on or before the first day of July next,. for the second thousand tons, and on or before the first day of January, 1860, for the third thousand tons on such notice being given; this shall be a binding contract on both parties, for the sale and purchase of the additional quantity, specified in the notice; and the said railroad company, in that case, agrees to deposit with
22 said T. B. Coddington & Co., as soon as the first thousand tons shall be ready for delivery in New York, an additional amount of similar Minnesota State bonds, by way of security, for the second 1,000 tons of iron, and with the like power to sell and dispose of the same, and as soon as the second 1,000 tons shall be ready for delivery to deposit a like amount of bonds as a security for the last 1,000 tons, the amount so to be deposited to be satisfactory to said T. B. Coddington & Co., but not to exceed seventy thousand dollars of bonds for each 1,000 tons of iron.

It is understood that William H. Newton shall, as early as practicable, proceed to Great Britain, to aid, on the part of said company, in the negotiation of the said bonds, and shall have authority on the part of the said railroad company to fix a price at which the said T. B. Coddington & Co. may take the said bonds themselves as cash, provided satisfactory arrangements cannot be made there for the purchase of iron with said bonds, or for the sale thereof.

In witness whereof, the parties hereto have executed these presents, the said Minnesota & Pacific Railroad Company, by their president, duly authorized by resolution of the board of directors
23 of said company.

The Minnesota and Pacific Railroad Company—
[SEAL.] By EDMUND RICE, *President.*
T. B. CODDINGTON & CO.

Witness resumes: The signature to the paper now shown is that of Mr. Rice. It was executed at the same time as the agreement. Defendant's counsel here offered in evidence letter of Price to T. B. Coddington & Co., dated 21 April, 1859, read in evidence as follows:

SAINT NICHOLAS HOTEL, *New York*, 21 *April*, 1859.

Messrs. T. B. CODDINGTON & CO.

DEAR SIRS: In conformity with an agreement made with you this day, I hand you, by Mr. Wm. H. Newton, forty-five thousand dollars of Minnesota State bonds, and will send you without delay a further amount of forty thousand dollars of like description State bonds as collateral, and for negotiations as per same agreement.

I also hand you our three notes bearing this date, at 6 months interest at seven per cent, one for six thousand dollars, and two for $5,000 each; in all $16,000, against which you will please grant a letter of credit for $16,000 in favor of Mr. Wm. H. Newton, stipulating that on your receiving the remaining forty thousand dol-

24 lars of bonds above referred to, you will accept draft drawn by him at one day's sight on you.

I am, yours, very respectfully,

EDMUND RICE,
Pres. Min. and Pacific Railroad Company.

The forty-five bonds mentioned in this letter were then in New York. The bond shown me is a specimen.

Seven per cent.
1,000.
Minnesota State.
No. 1.536.

STATE OF MINNESOTA.

Seven per cent.
1,000.
Railroad Bond.
No. 1,536.

The State of Minnesota acknowledges to owe, and promises to pay, to the order of the Minnessota and Pacific Railroad Company, at the Metropolitan Bank, in the city of New York, or at such other place in said city as may be hereafter designated by law, the sum of one thousand dollars, on the first day of December, A. D. one thousand eight hundred and eighty-three, with interest at the rate of seven per centum per annum, to be paid semi-annually at the place or places aforesaid, on the first day of June and December of each year, on the presentation and surrender of the proper coupon hereto attached.

25 This bond is issued under the authority of an amendment to the constitution of the State of Minnesota, adopted by the people on the 15th day of April, 1858, and proclaimed by the Governor of the State on the 5th day of May, 1858.

Witness the great seal of the State of Minnesota, and the signatures of the governor and treasurer of said State, at St. Paul, Minnesota, this third day of February, A. D. 1859, and of the State the first.

W. HOLCOMBE,
Governor ad interim.

Countersigned and registered.

GEO. W. ARMSTRONG, *Treasurer.*

The great seal of the
M
State of Minnesota.

Can't say the 45 were endorsed in the same way or not I

26 think the bonds were in Mr. Coddington's store, 76 Broad street at the time the contract was signed, in a package in his safe. After the signing I went to Mr. Coddington's office with his young man and there delivered the bonds. The contract was a number of days in negotiation. Rice was here during all the time.

On cross-examination witness testified:

The bonds had been in my possession but for safe keeping as there had been a robbery where I had kept them before. I asked permission to place them in Coddington's safe, which I did. I first re-

ceived the bonds about the 18th March, 1859, from Judge Nelson, in Minnesota, the acting president of the Minnesota & Pacific Railroad Company, under a letter of instructions from him. I came with them to Philadelphia where I met Mr. Rice, and came with him to New York. I placed them in Coddington's safe some 3, 4, or 5 days before the consummation of the contract, where they remained until then. When I received the bonds in Minnesota I signed the receipt or paper for them now handed to me. The letter of
27 instruction and witnesses receipt were then offered in evidence. Defendant's counsel objected severally to the introduction of these papers, on the ground that it is a transaction of which they had no notice, and with which they are not chargeable. The judge overruled the objection, to which decision the counsel for the defendant duly excepted.

The papers were then read in evidence, as follows:

Office of the Minnesota & Pacific Railroad Company,
St. Paul, March 18*th*, 1859.

William H. Newton, esq:

I authorize you to borrow upon $45,000 of Minnesota State R. R. bonds deposited with you $16,000 in money, and pay the interest coupons upon the first mortgage bonds of the M. & P. R. R. Co., which are due upon April 1st, in New York city, upon the presentation at the bank at which they are made payable.

(Signed) R. R. NELSON,
Acting President M. & P. R. R. Comp'y.

Office of the Minnesota & Pacific Railroad Company,
St. Paul, March 18*th*, 1859.

Received of the R. R. Nelson $45,000 State of Minnesota Railroad bonds, to be used as per instructions in letter of this
28 date, for payment of interest coupons on first mortgage bonds of the Minnesota & Pacific R. R. Co., due April 1st, 1859, in New York.

(Sig'd) WM. H. NEWTON.

I presume the giving of the receipt and the receiving of the letter were simultaneously. I received these bonds under this letter; no other way. Mr. Rice was sick at the time of the execution of the contract with T. B. Coddington & Co.; confined to his room most of the time while in New York. I conducted the negotiations with Mr. Coddington and his partners under Mr. Rice's advice and counsel. I did not act for both; can't say whether Mr. Coddington ever saw Mr. Rice on this matter while negotiations were pending. I communicated to Rice the proposition from Mr. Coddington. I had then known Coddington a long while, and had had business transactions with him; did not have any place at his store, or keep other papers there. I had conversation with him in May, 1859, in regard to the surrender and delivery of these bonds. Mr. Coddington at that

time, I think, claimed that he was entitled to damages under the contract for its non-performance; can't say whether he at that
29 time informed me that the 45 bonds were then in England, or
that he told me that the surrender of the contract could not be entertained until he was advised from England; may have done so. The letter shown me, which I wrote to Mr. Rice, contained the purport of my conversation with Mr. Coddington. Letter offered in evidence.

(Defendant's counsel objected to the letter as irrelevant. The court overruled the objection and admitted the letter, to which decision the counsel for the defendant then and there duly excepted.) The letter was then read in evidence as follows:

NEW YORK, *May* 21, '59.

EDMUND RICE, Esq., *President M. & P. R. R. Co.*

SIR: I have presented the resolution of the board of directors of the M. & P. R. R. Co. to Messrs. T. B. Coddington & Co., and requested a surrender of the contract made by yourself as pres't for purchase of iron rails.

Messrs. T. B. Coddington & Co. informed me that in compliance with the terms of the contract the 45 bonds deposited with them were now in England in the hands of a member of their firm with instructions to sell them for and on account of the M. & P. R. R. Co.,
and no proposition for a surrender of the contract could be
30 entertained, until advised of the action or disposition, was
received from London, where they were by last advices.

I shall inform you of the conclusion of T. B. Coddington & Co., as soon as informed.

Yours, truly, &c.,

WM. H. NEWTON.

Witness resumes: At the time Mr. Rice signed the letter to T. B. Coddington & Co., of April 21, 1859, I received no bonds from him. I think this letter was brought to the hotel by Mr. Coddington's man, not by me; can't say whether he and I went to the hotel together. The letter was ready for signature when we met at the hotel. Don't know who wrote it; don't know the handwriting; it is not Rice's, except the signature. I think the contract and this letter were brought together to the hotel by me for signature by Mr. Rice. Don't know where they were prepared. After they were brought to the hotel, Mr. Rice read them over and executed them. I cannot relate the conversation that took place at the time. I knew the authority, and resolutions, under which Mr. Rice was acting. I was aware of the resolutions. I have no recollection that Mr. Coddington was present at any of these interviews between Rice and myself. I
31 was not acting for Mr. Coddington. His young man, Douglas,
came up to bring the papers for execution.

Q. What was said at that time by Mr. Rice to you in regard to his power of making the contract?

(Defendant's counsel objected to the evidence, on the ground that defendant is not bound by what was said.)

(The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.)

Witness resumes: I am positive nothing was said on the subject. I was sworn in a suit, entitled T. B. Coddington & *als.* *vs.* the Minnesota & Pacific Railroad Comp'y.

Q. Do you recollect that in answer to the following question, Did Mr. Rice ever tell you in furnishing you the copy of the resolutions of the board of directors that the proposed arrangement would have to be ratified by the board, before it should be binding, you testified, "I don't recollect that he did; we had considerable power in regard to making the contract; a general authority for making the contract."

A. I presume I answered so. It was true then and now.

32 I had read the resolutions under which Rice acted previous to the negotiation for the contract. I referred to the resolution mentioned in the contract.

Re-direct.

I have a copy of the resolution which the secretary gave me as such referred to in my letter to Mr. Rice of May 31st, 1859. The resolutions were read as follows:

SECRETARY'S OFFICE, MINNESOTA & PACIFIC R. R. CO.,
Saint Paul, May 17th, 1859.

At a meeting of the board of directors of the Minnesota & Pacific R. R. Co. held in St. Paul, May 13th, 1859, the following resolution was unanimously adopted:

Whereas, circumstances have arisen in the affairs of this company, whereby it has become impossible to comply with the terms of the contract made by the president thereof, on behalf of the company with T. B. Coddington & Co., of the city of New York, under date of April 22d, 1859. Therefore—

Resolved, That Wm. H. Newton, esq., be, and he is hereby, authorized to proceed to New York and procure a surrender of said contract and a return of the forty-five Minnesota State bonds transferred to Messrs. Coddington & Co. upon such equitable terms as may be agreed upon.

T. M. METCALF, *Secretary.*

33 I came to New York for the company to obtain the surrender of these bonds. The directors of the company, on 21st May, 1859 were Messrs. Rice, R. Nelson, Hatch, Benjamin Thompson, Franklin Steele, and Short, and myself; I don't know that I can name them all. I was present at the meeting of the 13th May, 1859, at which the resolution just read was passed.

At the time the contract was executed, I think there was no conversation between Rice and myself on the subject of our authority for making it. Judge Nelson's letter was never exhibited to Mr. Coddington or any one representing him; the receipt I had not.

I don't know that I ever put the bonds personally into the hands or possession of Mr. Rice. The bonds were in the room with Mr. Rice; and the subject was mentioned of cutting off the coupons due, or coming due; they were cut off. I brought the bonds to Rice's room, and left them there; presume they were in his bureau or secretary. When Rice and I were New York negotiating this contract, he stopped at the St. Nicholas hotel, and I at my brother-in-law's. On March 18th, 1859, Mr. Rice was not in Minnesota, but in New York. Judge Nelson acted as president in his absence. Rice was not there, till we went back together. I did not see Mr. Rice sign the endorsemsnt on the bonds. I think his signature
34 was not there when I brought on these bonds. Judge Nelson had been acting as president for several weeks; don't know but longer. Rice was on in New York and Philadelphia for some considerable time.

Cross-examined.

I was present at the meeting when the resolution was passed.

Q. Do you recollect what was said prior to its passage?

(Defendant's counsel objected to any parol proof of what passed at that meeting on the ground that the proceedings are matters of record.)

The court overruled the objection, to which decision the counsel for defendants then and there duly excepted.

Witness answers: I had frequently stated that there would be no difficulty in getting Mr Coddington to return these bonds, but I do not know that I said so at the time the resolution was passed. The directors were present at that meeting. Among them Mr. Rice, Judge Nelson, Mr. Hatch and others. I don't know what influence my statements had in the passage of that resolution.

I had stated that if I could see Mr. Coddington, I believed I could obtain a surrender of the contract and of the bonds. I don't know that Judge Nelson stated to me at the time of the meeting that the resolution was passed, because I had so stated; cannot ans-
35 wer more definitely. I presume I was selected to go to New York, because of my statement that there would be no difficulty in getting Mr. Coddington to surrender the bonds. I stated to Mr. Hatch, the plaintiff, that my relations with Mr. Coddington were such that I believed I could obtain a surrender of the contract, but have no recollection of telling him that Coddington had no lien upon the bonds.

Plaintiff's counsel here renewed his examination to shew that the defendant had delivered no iron, and paid no money under the contract.

(Defendant's counsel objected to the evidence as irrevelant.)

(The court overruled the objection, to which decision the counsel for the defendant then and there excepted.)

Witness resumes: No iron was to my knowledge ever furnished or tendered to the Minnesota & Pacific Railroad Co., nor was the sum of

$16,000 paid to them, nor any loan made to them by Coddington & Co., nor was any money ever paid under the letter of credit given by Coddington & Co.

Re-direct.

When I came on to New York, as special agent under the resolution of May 13th, 1859, I wrote the letter, dated June 7th,
36 1859, now shown to me.

Defendant's counsel offered the letter to Coddington & Co. in evidence.

(Plaintiff's counsel objected.)

The court sustained the objection, and excluded the letter of which the following is a copy:

NEW YORK, *June 7th*, 1859.

Messrs. T. B. Coddington & Co.

GENTLEMEN: I am, by a resolution of the board of directors of the Minnesota & Pacific Railroad Company, adopted May 17th, 1859, authorized to procure a surrender of the company's contract, made by the president Edmund Rice, esq., with your firm, under date of April 22nd, 1859, upon such equitable terms as may be agreed upon. In compliance with the request of Edmund Rice, esq., under date of May 24th, as president, I would briefly state the circumstances, which have arisen in the affairs of the company, whereby it has become impossible to comply with the terms of this contract. On the execution of the contract Mr. Rice immediately telegraphed to R. R. Nelson, acting president, at St. Paul, to retain the $40,000 State bonds (as an arrangement had been made here) to carry out the contract with you; Mr. Rice leaving for St. Paul the following morning for the purpose, and fully expecting to comply with the pro-
37 visions of the contract by forwarding the bonds then in the
possession of the company. On arriving at St. Paul, at our interview with Judge Nelson, he approved of the contract, but stated that he had made a partial arrangement with Selah Chamberlain, esq., to advance money to the company, and paid over to him the bonds referred to, to be applied in payment for work upon the road; therefore it could not be carried out, unless Chamberlain would surrender them, or the company could have an extension of time sufficient to grade ten miles of the road bed, and obtain $100,000 State bonds with which to comply with the provisions of this contract. Upon this suggestion I wrote you, and your letter of the 6th of May, extended the time ninety days, was received; up to this time it was the opinion of the board that there was no contract existing with Mr. Chamberlain to prevent its adoption.

A meeting of the board of directors was held; the contract with you was presented for approval; action upon it was deferred until the legal relations of the company with Mr. Chamberlain were decided upon by the counsel of the company. At the next meeting of the board of directors negotiations were entered upon with Mr. Cam-

berlain for a new or supplemental contract which resulted in
38 terms being agreed upon for completing and stocking sixty-
two miles of their road, and upon the passage of the resolution (a copy of which is enclosed) no further notice at action was had in relation to the contract with you. As I did not approve of the future policy of the company, as instituted by this contract with Mr. Chamberlain, I then requested the president to accept my resignation as director, which was tendered and accepted at the next meeting of the board.

I was, as the special agent of the railroad company, requested to obtain the surrender of the contract and bonds, and have here your letter of credit and contract for that purpose, with the accompanying papers. You will please inform me at your earliest convenience upon what terms you will cancel and surrender this contract; also, if you will deliver the bonds in your hands upon the order of R. R. Nelson, as acting president, a copy of which is herewith enclosed.

Very respectfully, your ob'd serv't.
WM. H. NEWTON,
As Special Agent for Minnesota and Pacific Railroad Co.

The said counsel for the defendant, then and there duly excepted to the exclusion of said letter.

39 Witness resumes: When I saw Mr. Coddington, I made no
proposition. I stated substantially the resolution to Mr. Coddington, that I came to have the contract and the bonds surrendered. At that time, I think, I made no other proposition. I had then no other authority than is contained in the letter. I don't know that there was any restraint or limit upon me as to the terms on which I should procure a surrender referred to in the resolution. All the 45 bonds were of the same issue of February 3d, 1859. Defendant's counsel read in evidence the act authorizing the issue of the State bonds in question, from statutes of Minnesota, p. 66, section 10.

Section 10. The credit of this State shall never be given or loaned in aid of any individual, association, or corporation, except that for the purpose of expediting the construction of the lines of railroads in aid of which the Congress of the United States has granted lands to the Territory of Minnesota, the governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the legislative assembly of Minnesota, the special bonds of the State, bearing an interest of seven per cent. per annum, payable semi-annually in the city of New York as a loan of public credit, to
an amount not exceeding twelve hundred and fifty thousand
40 dollars, or an aggregate amount to all of said companies not
exceeding five millions of dollars, in manner following, to wit: Whenever either of the companies shall produce to the governor satisfactory evidence, verified by the affidavits of the chief engineer, treasurer, and two directors of said company, that any ten miles of the road of said company has been actually constructed and completed, ready for placing the superstructure thereon, the governor

shall cause to be issued and delivered to such company bonds to the amount of one hundred thousand dollars, and whenever thereafter, and as often as either of said companies shall produce to the governor like evidence of a further construction of ten miles of its road as aforesaid, then the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars for each and every ten miles of road thus constructed; and whenever such company shall furnish like evidence that any ten miles of its road is actually completed and cars running thereon, the governor shall cause to be issued to such company like bonds to the
amount of one hundred thousand dollars; and whenever there-
41 after, and as often as either of said companies shall produce
to the governor like evidence that any further ten miles of said road is in operation as aforesaid, the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars, until the full amount of the bonds hereby authorized shall be issued: Provided, that two-fifths, and no more, of all bonds issued to the Southern Minnesota Railroad Company shall be expended in the construction and equipment of the line of road from La Crescent to the point of junction with the transit road as provided by law. And further provided, that the Minneapolis Cedar Valley Railroad Company shall commence the construction of their road at Faribault and Minneapolis, and shall grade an equal number of miles from each of said places. The said bonds thus issued shall be denomenated "Minnesota State Railroad Bonds," and the faith and credit of this State are hereby pledged for the payment of the interest and the redemption of the principal thereof. They shall be signed by the governor, countersigned and registered by the treasurer, sealed with the seal of the State, of denomenations not
exceeding one thousand dollars, payable to the order of the
42 company to whom issued, transferable by the endorsement of
the president of the said company, and redeemable at any time after ten, and before the expiration of twenty-five, years from the date thereof. Within thirty days after the governor shall proclaim that the people have voted for a loan of State credit to railroads, any of said companies proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same, shall notify the governor thereof, and shall within sixty days, commence the construction of their roads, and shall within two years thereafter construct, ready for the superstructure, at least fifty (50) miles of their road.

Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered, as aforesaid, to said company, and for the punctual payment of the interest which shall accrue thereon in such manner as to exonerate the treasury of the State from any advances of money for that purpose; and as security therefor, the governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land. free from prior incumbrances, which such company is or may be authorized to sell in trust for the better security of the treasury of the State from loss on said bonds, 43 which said deed of trust shall authorize the govenor and secretary of State to make conveyances of title to all or any of such bonds to purchasers, agreeing with the respective railroad companies therefor. Provided, that before releasing the interest of the State to such lands, such sale shall be approved by the governor, but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and as further security an amount of first mortgage bonds on the roads, lands and franchises of the respective companies corresponding to the State bonds issued shall be transferred to the treasurer of the State at the time of the issue of State bonds; and in case either of said companies shall make default in payment of either the interest or principal of the bonds issued to said companies by the governor, no more State bonds shall thereafter be issued to said company, and the governor shall proceed in such manner as may be prescribed by law to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same. Provided, that if any company so in default before the day of sale, shall pay all interest and principal then due and all expenses incurred by the State, no sale shall take place and the right of said company shall not be impaired to a 44 future loan of State credit. Provided, if any of said companies shall, at any time, offer to pay the principal, together with the interest that may then be due upon any of the Minnesota State railroad bonds which may have been issued under the provisions of this section, then the treasurer of State shall receive the same, and the liabilities of said company or companies, in respect to said bonds, shall cease upon such payment into the State treasury of principal, together with the interest as aforesaid. Provided further, that in consideration of the loan of State credit herein provided, that the company or companies which may accept the bonds of the State in the manner herein specified, shall as a condition thereof, each complete not less than fifty miles of its road, on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866; and any failure on the part of any such company to complete the number of miles of its road or roads in the manner and within the several times herein prescribed, shall forfeit to the State all the rights, title, and interest of any kind whatsoever in and to any lands, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by them constructed, and a fee simple to which has not accrued to either of said companies by reason of such construction which was granted to the company or companies thus failing to comply with the provisions hereof, by act of the legislature of the territory of Minnesota, vesting said land in said companies respectively.

45 Defendant's counsel then offered in evidence the record of a judgment recorded in the Supreme Court of the State of New York, in an action brought by Thomas B. Coddington & others, composing the firm of T. B. Coddington & Co., against the Minnesota & Pacific R. R. Co., upon the contract of April 21st, 1859, to ascertain plaintiff's damages and to have the bonds sold on account of such damages. Summons served October 20, 1859. Answer of the company put in by Barbour, Lee & Smidt, as defendant's attorneys, and verified by Franklin Steele, director, January 6, 1860. Judgment, November 6, 1860. Record filed, November 7, 1860. Plaintiff's counsel objected.

Plaintiff's counsel objected to the record being received in evidence by way of estoppel, but was willing it should be received as a part of the history of the case and of the transactions of the defendant in the matter. The court held that the title of plaintiff was not involved in that action and admitted the record, but not as an estoppel, but as a circumstances perhaps proper to be submitted to the jury, to which ruling and decision defendant's counsel duly excepted. The copy of the record so offered in evidence is hereto annexed.

46 William H. Newton recalled, and being shown a deposition of plaintiff as a witness in the action last mentioned, taken under commission, testified that the signature to the deposition was that of Mr. Hatch. The letter now shown me is signed by Rice. Defendant's counsel read in evidence letter from Rice to Coddington & Co., dated St. Paul, April 30, 1859, as follows:

OFFICE OF THE MINN. & PACIFIC R. R. CO.
St. Paul, April 30, '59.

GENTLEMEN: I found upon my arrival here that the acting president of this company had disposed of the forty Minnesota State bonds which were to have been forwarded to you by the terms of the contract made between us in New York. You will perceive, therefore, that it is impossible for the company at the present time to comply with its undertaking. Some action of the board of directors will be had upon the subject, which I shall take pleasure in advising you of at the earliest moment.

Very respectfully, your ob'd serv't,
EDMUND RICE,
Pres't Minn. & P. R. R. Co.

T. B. CODDINGTON & CO., *New York.*

47 *Cross-examined.*

At that season of the year, when the contract was made, I suppose it might take a week to go from New York to St. Paul.

Q. At the time of the execution and delivery of this contract, was it not agreed and understood that Mr. Rice should go to St. Paul and ascertain whether the company would ratify that contract?

(Defendant's counsel objected to any parol evidence to that effect.

The court overruled the objection and counsel, for the defendant, then and there duly excepted.)

Witness answered: No, sir; nothing of the kind. I don't recollect
anything being said about the contract not being carried out if judge
Nelson had disposed of the other 40 bonds; I don't think that ques-
tion came up. I was not present when Coddington & Co. received
Rice's letter of April 30. I think I never saw it before to-day. I
was not present when they replied to it. I was not consulted in re-
gard to the reply. I was then in Minnesota. I am confident
48 that I did not advise Coddington & Co. to write a letter insist-
ing on their part to carry out this contract. I did not advise
or instigate the suit against the company.

Re-direct.

I returned to St. Paul the day after the execution of the contract, and I must have remained there until about the 17th day of May, when I received the letter of instructions. During that period I don't know how often the directors met; they had one meeting and may be more. This contract was frequently the subject of conversation between the directors and myself.

Re-cross.

After going out with Rice, I left St. Paul on the 17th or 18th of
May. I was not at the office of the company when this letter was
written that I recollect. I presume I knew of it. I have no doubt,
that at the time I had stated, and that the directors understood there
would be difficulty on the part of Coddington & Co., relinquishing
the contract and surrendering the bonds. During the summer of
1859, I had no business transactions with Coddington & Co. other
than connected with this matter. Nichols was a partner
49 in this firm. I was, in 1859, joint owner with Coddington in real
property purchased some time before; my interest therein
ceased a year and a half ago. I had this interest at the time of these
negotiations. I was not interested with him in anything else at that
time. In 1860 and 1861, I was interested with him in knitting ma-
chines; no other interest.

Re-direct.

This real estate was at Lake Superior. Mr. Rice was interested with me in real estate in Minnesota. The interest in knitting machines grew out of advances by Coddington to a company formed to develope a patent, in which I was interested. I can't say positively that Hatch was present at the meeting of directors that occurred after my return home and up to the 17th of May. I think he was.

George E. Horn, called for the defence, and being duly sworn,
testified as follows: In 1859 I was clerk in the office of Spier & Nash,
plaintiff's attorneys in the suit spoken of against the Minne-
50 sota & Pacific Railroad Company. I knew the firm of Bar-
bour, Lee & Smidt, defendant's attorneys in that case.
Judge Barbour, or John M. Barbour, whose name is in Hatch's
order introduced here, is the Mr. Barbour then of that firm.

Samuel J. Dennis, called for the defence, being sworn, testified as follows: In March, 1860, I assisted the auditor of the State of Minnesota in making sales of Minnesota State bonds. I was at that time somewhat familiar with the bonds of that State. The sales were made here through Simeon Draper, auctioneer, upon the account of some three or four banks of Minnesota that were winding up. They were Minnesota seven per cent. railroad bonds issued to the railroads by the State. I think they were of the character of the bond now shown me. On May 9, 1860, they sold here as follows: 2,400 at 17 cents; 1,300 at 16 cts.; 10,000 at 17½ cents; 4,000 at 17½ cents, and 13,000 at 16 cents; all at public auction by Mr. Draper, auctioneer, under order of William F. Dunbar, auditor of the State of
51 Minnesota, bearing date March 26, 1860. Dunbar was here himself. There was the usual attendance at these sales. The rates I gave were the highest offered for the bonds; they were bought by bona fide purchasers, who paid their money.

On cross-examination witness testified: The bonds sold were Minnesota seven per cent. railroad bonds, issued to two different roads, which I cannot specify. I did not examine the particular bonds as they were delivered. I don't know the present value of those bonds. These had been deposited with the comptroller for currency issued by the several banks. The banks having failed to redeem the currency, their bonds were sold.

Q. Were not these bonds used for banking purposes, and taken at par as such in Minnesota?

(Defendant's counsel objected on the ground that it is not proper evidence of value. The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.)

Witness resumes: These bonds were deposited by these several banks with the comptroller, and currency was issued upon them at about par, I think.

52 *Re-direct.*

These were State bonds issued to the railroads.

George T. Kellogg, called for the defence, being duly sworn, testified as follows: I was in the employment of Simeon Draper in March, 1860, and I have the records of the sale of these bonds spoken of by Mr. Dennis. I was at the sale. They were sold in quantities, and at prices as stated by him. They were bought by Clark, Dodge & Co., of this city. There was another sale of the same style of bonds on September 12, 1861, of 30,000 at 17, by order of Charles McGrath, auditor of the State of Minnesota.

On being cross-examined witness testified: I know nothing of the present value of these bonds, nor their value in 1863 and '4. The bonds sold did not pass through my hands. I don't remember whether they were exhibited at the sale.

Jacob Bernheimer, called for the defence, being duly sworn, testified as follows: The five bonds I hold in my hand belong to me. I bought them at a sale made by Mr. Rodman at the N. Y.

53 Exchange, Dec. 1, 1860; have had them ever since. I think
this coupon was cut off when I bought the bonds. I have
received no interest on them since.

On being cross-examined, witness was asked:

Q. Do you now consider those bonds as good as par?

(Objected to by defendant's counsel. The court overruled the objection; to which decision the counsel for the defendant then and there duly excepted.)

Witness answers: Not at present. I consider them good; I have no idea what they are worth to-day.

Re-direct.

I know nothing of their present market value; I paid 29 cents for them.

George L. Nichols, called for the defence, being duly sworn, testified as follows: In 1859 I was one of the firm of T. B. Coddington & Co., and took part in the negotiation of this contract. After it was executed, our firm was entirely able to carry it out. We had
about 700 tons iron in transit, and about 2,000 bought on the
54 other side. I sent over one bond to our house in Europe by
the first steamer after the contract was signed, and I myself
went over on the 27th April, and before the receipt of Mr. Rice's letter from Minnesota. I took the bonds with me. While in Europe I was advised of the difficulty in carrying out the contract. I think the letter of credit, mentioned in the contract, was delivered to Mr. Rice at the time of its execution. Our firm was entirely able to pay the money on the deposit of the residue of the bonds.

On being cross-examined, witness testified: I think we ordered the 2,000 tons iron before the date of this contract; it was not ordered on account of it. I reached Liverpool on the 9th or 10th of May, whence I went to London, and there at once called on Peabody & Co., knowing they were the American house there, and would be referred to by iron masters, in reference to these securities. I subsequently went to Liverpool to negotiate for a greater quantity of
iron, and I attended to nothing else for some ten days after
55 my arrival there, when I learned from here that the parties
refused to carry out their contract. I returned in August.
Mr. Newton negotiated the contract on the part of the Minnesota & Pacific Railroad Company. I think we sold no iron, on account of this company, on or before the 1st November, 1859, either at public or private sale. Nothing was advanced under the letter of credit, which, I think, was delivered, with the contract, to Mr. Rice, at the St. Nicholas Hotel.

Re-direct.

It was sent up by Douglas, who has since died. I think I brought the bonds back from Europe with me; they all were at the sale where Mr. Bernheimer bought.

Re-cross

Mr. Coddington has now none of the bonds; he has disposed of them within the last 2 or 3 years.

The counsel for defendant here rested his cause.

The plaintiff, further to maintain the said issues, on his part called as a witness—

56 Edmund Rice, who being duly sworn, testified as follows:

In 1859 and '60 I was president of the Minnesota and Pacific Railroad Company; I knew Mr. Newton; knew about the bonds in controversy here. I first knew of their being in Mr. Newton's possession the last of March or first of April, 1859, when he joined me in Philadelphia. I saw a package there which he said were the 45 bonds. I subsequently saw him in New York. I probably saw the bonds in New York. I know of this contract spoken of. It was executed at the St. Nicholas hotel. Mr. Newton was present, and a young man from Coddington & Co. I had been very sick for two weeks.

Q. What was said between you and Newton at the time of the execution of that paper?

Defendant's counsel objected to parol evidence of what occurred at the time of the execution of the contract.

The court overruled the objection, to which decision the counsel for the defendant then and there excepted.

57 There was good deal of conversation pending the negotiations in respect to delivering the contract. I directed Newton to deliver it conditionally, not to take effect unless ratified by the board of directors of the company; nor if Judge Nelson, then acting president, had disposed of 40 bonds, supposed to be in his possession, and the only bonds which the company had besides these 45; that the company could not ratify it if these bonds were disposed of; it would not be in their power to do it; these were the 40 bonds which the contract called for to be sent to Mr. Coddington. The body of the letter of April 21, now shown me, is not in my handwriting; the signature is mine. The letter and the contract were brought to my room at the St. Nicholas hotel; none of the bonds were at that time in my possession. I had them only once prior to seeing Newton.

Q. Who first suggested to you the making of this contract?

Defendant's counsel objected to the question.

The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.

58 Witness answers: Newton first suggested it. I never had any conversation with Coddington or his partners in relation to the negotiations or consummation of the contract; did not see any of them. The negotiations were all conducted by Mr. Newton.

Q. Had you any power or authority from the railroad Co. to deliver these bonds to any party?

Defendant's counsel objected to the question.

The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.

Witness answers: I had no power; and did not profess to have any; quite the reverse.

Q. What conversations were had between you and Newton during the negotiations for, or at the time of the execution of the contract in regard to your authority or power to make any such contract?

Defendant's counsel objected to the question.

The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.

Witness answers. I told Mr. Newton that neither of us had any
power to make the contract. I handed him a certified copy
59 of the resolution of July 13, 1858, of the Minnesota and
Pacific Railroad Co., authorizing me to dispose of the first
mortgage bonds of the company, which I asked him to show Coddington or deliver to him, to satisfy Coddington & Co. what authority, what confidence the company had reposed in me. I further stated to him that if Judge Nelson had not disposed of the forty bonds, the company would undoubtedly ratify the contract; if he had disposed of them the company could not ratify it.

Defendant's counsel renewed his objection to this evidence, on the ground that defendants were not present.

The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.

Witness resumes: Newton and I left for St. Paul on the day following the execution of the contract, and arrived there on the 28th or 29th of April.

Q. State whether you ascertained if the contract would be carried out?

Defendant's counsel objected to the question.

The court overruled the objection, to which decision the counsel
for defendant then and there duly excepted.

60 Witness answers: We met Judge Nelson on our arrival
there, and were informed that he had disposed of the 40
bonds to raise $16,000 to pay interest, and I immediately wrote to Coddington & Co. by my letter of 30th April, advising them of the fact, and that the company could not carry out the contract. I was in Minnesota on the 13th May, 1859. Newton was there.

Q. What, if anything, was stated by Newton at the time the resolution of the 13th May was introduced at the meeting of the board?

Defendant's counsel objected to the question, the proceedings of the board being matter of record.

The court overruled the objection, to which decision the counsel for the defendant then and there duly excepted.

Witness answers: Mr. Newton stated to the board that Coddington & Co. would make no claim to the bonds or to carrying out of the contract, and as he had conducted all the negotiations with them he desired to return to New York for the purpose of getting the bonds on behalf of the company, and that he could do so. Some one suggested that Mr. Coddington had been put to trouble in draw-

ing the contract; Newton said he knew he would make no claim to compensation. The directors, however, expressed a willing-
61 ness to remunerate him for his trouble, if he claimed it, and authorized Newton to offer such remuneration. He desired to be made the agent to procure the surrender of the contract, as he had negotiated it; said his relations were very friendly with Coddington & Co. (The book of the minutes was produced to witness.) The resolution now shown me is the one referred to in the contract. It was passed long before the State bonds came into existence.

Plaintiff's counsel here read in evidence the resolution of July 13, 1858, as follows:

MINNESOTA & PACIFIC RAILROAD COMPANY,
Secretary's Office.

At a meeting of the board of directors of the Minnesota & Pacific Railroad Company, held at the office of the said company, in Paul, on the 13th day of July, 1858, present Messrs. Woodbury, Prince, Rice, Newton, Burton, Thompson, Hatch and Lynch, the following resolutions were adopted:

Resolved, That this company hereby authorize and direct the execution, on the part of the company, of the first mortgage deed the form of which was approved by resolution of this board, dated June 28, 1868.

And whereas, the interest of the Minnesota & Pacific Railroad Company require that no default in the performance of the
62 conditions under which the credit of the State of Minnesota has been loaned to this company, shall occur, and that means shall be promptly provided with the aid of said loan State credit, to construct one hundred miles of road at an early day, thereby vesting in the company the right to sell unconditionally three hundred and eighty-four thousand acres of land, therefore resolved: That Edmund Rice, President of the Minnesota & Pacific Railroad Company, or any agent or agents duly appointed and substituted by him, in writing to execute the trusts and powers conferred by this resolution, be and are hereby authorized and empowered in pursuance of section twenty-one of the charter to sell, loan, pledge, hypothecate, or otherwise dispose of the first mortgage bonds of the company in conformity to the provisions of the trust mortgage deed of said company at par, or any price less than par, and for such sum or sums as the said Rice, or agents appointed by him, shall appear most for the interest of the company. And the said president, or such agent or agents as he may appoint, is, and are hereby, authorized to borrow such sum or sums of money for such length of time, and for such rate of interest as to him or such
63 agent or agents may seem proper, for or on behalf of the company; and also to purchase such quantity of iron rails, locomotives, cars, tenders, rolling stock, and machinery, for such road, and upon such terms as he or such agent or agents may deem advisable, and to make, execute, and deliver, in the name and on behalf of said company, such obligations, bills of exchange, contracts, and

agreements in writing, as will enable him, or such agent or agents, to carry out the powers and authority above conferred upon him and them, making monthly reports to the board of his acts in the premises, all which acts thereunder done are hereby ratified and confirmed: Provided, That the whole amount of obligations to be incurred on behalf of the company, under this resolution, shall not exceed the sum of seventeen hundred and fifty thousand dollars.

A true copy from the minutes.

Attest:

[L. S.] JAS. W. TAYLOR,
Secretary.

The bonds were issued in February, 1859. The State had not issued bonds in July, 1858; the State bonds, part of which are here in controversy, were not issued, and were not in existence until February, 1859.

64 Witness being shown the assignments to Chamberlain and to plaintiff, says these assignments were made on the 13 May, 1859, prior to the passage of the resolution of that date.

Q. What was the value of these bonds April 21, 1859 ?

(Defendants counsel objected on the ground that plaintiff cannot go back to prove value after closing his case.)

The court overruled the objection, stating that it was a matter of discretion with the court; to which decision the counsel for the defendant then and there excepted.

Witness answers: A few weeks prior to April 21, 1859, these bonds sold here at 60 cents, and in St. Paul, about that time, @ 95, for banking purposes. They passed freely there in the payment of debts at par. The company never received any iron or money under this contract; none was ever tendered.

On being cross-examined, the witness testified: In March, 1859, I was not in Minnesota; I had been absent from the last of August and I was not there until after I arrived, about the 25th or 26th of April. I endorsed the bonds in New York at the St. Nicholas Hotel. The signature to endorsement is mine. I did not cut off the coupon from the bond now shown me. The bonds were brought down by Hatch, the plaintiff, the whole 100 of them. This was in
65 February or March. I endorsed them at that time; I think it was in February. He disposed of the 15 and returned the remaining 85 to St. Paul; they were all of the same date, issued for ten miles of the road. That is the sale I spoke of at 60 cents. Next saw them, if at all, when Newton came to Philadelphia. I was negotiating there, trying to buy iron. Newton and I came to New York together. It was about a week before I knew of any negotiation being opened with Coddington. The terms of that negotiation were submitted to me by Newton as it progressed from time to time. I furnished Newton with a certified copy of those resolutions of July 13th, 1858. The paper now shown me is a certified copy of the loan bill which authorized the issue of the State bonds to our company, and this I furnished to Mr. Coddington. This was furnished me by the company, and I brought it with me with the resolutions furnished

at the same time. May have also furnished copy of charter and report of the company. Newton passed between me and Coddington; saw him almost daily. After papers were signed, I stated next day for St. Paul.

(Defendant's counsel reads in evidence the record of the proceed-
ings of the board of directors of the Minnesota & Pac. R. R.
66 Co., of April 29th, 1859, April 30th, May 6, 9, 11, 12, and
13, 1859, as follows:)

St. Paul, Friday, *April* 29, 1859.

In pursuance of a call of the president, the following directors of the Minnesota & Pacific Railroad Company assembled on Friday, April 29, viz: Messrs. Rice, Newton, Nelson, Thompson, Steel, Hatch—6.

No quorum present, the meeting adjourned to Saturday, April 30th, at 10 o'c a. m.

EDMUND PRICE, *President.*

James W. Taylor, *Secretary.*

St. Paul, Saturday, *April* 30*th*, 1859.

The board of directors assembled pursuant to adjournment. Present, Messrs. Rice, Nelson, Newton, Prince, Hatch, Steele, H. T. Welles, Thompson—8.

Mr. Rice made some statements in regard to the policy of the company, and after discussion, the board adjourned to Friday, May 6th, 1859.

EDMUND RICE, *President.*

James W. Taylor, *Secretary.*

67 St. Paul, Friday *May* 6, 1859.

The board of directors of the Minnesota & Pacific Railroad Company assembled, pursuant to adjournment, at the office of the company in St. Paul, on Friday, May 6, 1859. Present. Messrs. Rice, Hatch, Newton, Woodbury, Prince, H. T. Wells, D. Wells, jr., Thompson.—8.

The followiug resolution was unanimously adopted :

Resolved, That the annual meeting of the stockholders of the Minnesota & Pacific Railroad Company is hereby appointed to be held at the office of the company on Wednesday, 32d June, and that notice of the same be published in the Pioneer and Times newspapers of St. Paul. and in the St. Anthony Express as prescribed in by-law.

Adjourned to Monday, May 9, 1859.

EDMUND RICE, *President.*

James W. Taylor, *Secretary.*

St. Paul, Monday *May* 9*th*, 1859.

The Board of directors of the Minnesota & Pacific Railroad Company assembled pursuant to adjournment. Present: Messrs. Rice, Ramsey, Nelson, Newton, Hatch, Woodbury, Thompson, Prince, D. Wells, jr.—9

A communication from S. Chamberlain, esq., was read, and after discussion was referred to the executive committee. The
68 board then adjourned to Tuesday 10th of May.

EDMUND RICE, *President*.

James W. Taylor, *Secretary*.

St. Paul, Tuesday *May* 10*th*, 1859.

The board assembled pursuant to adjournment. Present: Messrs. Rice, Ramsey, Steele, Woodbury, Hatch, Newton, Thompson, Lynd. Nelson, Prince.—10.

The executive committee reported informally upon the communication of Mr. Chamberlain.

The report was laid upon the table.

Adjourned to May 11th, 1859, at 10 o'clock a. m.

EDMUND RICE, *President*.

James Taylor. *Secretary*.

St. Paul, *May* 11*th*, 1859.

The board assembled pursuant to adjournment. Present: Messrs. Rice, Ramsey, Nelson, Newton, Hatch, Woodbury, Thompson, Prince, D. Wells, jr.—9.

On motion of Mr. Prince a committee of four, consisting of Messrs. Rice, Ramsey, Nelson, and D. Wells, jr., were appointed to confer with Mr. Chamberlain upon questions raised by his communication, May 9th, 1859.

Board then adjourned to May 12th, 1859.

EDMUND RICE, *President*.

James W. Taylor, *Secretary*.

69 Saint Paul *May* 12, 1859.

The board assembled, to adjournment. Present: Messrs. Rice, Ramsey, Nelson, Newton, Hatch, D. Wells, jr., Prince, and Woodbury.—8.

A report was presented by Mr. Rice from the select committee appointed to confer with Mr. Chamberlain, and after divers amendments thereto its further consideration was postponed to May 13th at 10 o'clock a. m.

The board then adjourned to Friday, May 13th, at 18 o'clock a. m.

EDMUND RICE, *President*.

James W. Taylor, *Secretary*.

Saint Paul, Friday, *May* 13, 1859.

The board of directors of the Minnesota & Pacific Railroad Company assembled at the office of the company, pursuant to adjournment. Present: Messrs. Rice, Hatch, Nelson, Newton, Prince, Ramsey, H. T. Wells, D. Wells, jr., Woodbury.—8.

The following bases of an arrangement with J. Chamberlain was adopted by the board:

1. Chamberlain to subscribe to $500,000 of the capital stock, and pay pr. ct. or 25,000 thereon by applying this sum upon the

70 amount to become due on the completion of his extended or 30 miles contract. Books to be then closed, except that the company may receive further subscriptions or issue stock, but it shall not interfere with the election of directors unless by mutual consent. The stock to be assigned R. R. Nelson and voted by him, or such person as he may appoint. At the completion of his contract, on repayment of the $25,000 to Chamberlain or his assignee, the stock above named shall revert to the company.

2. Then directors are to be chosen by the stockholders, and five by Chamberlain.

3. The current expenses for engineering, office, rent, salaries, &c., to be estimated, which Chamberlain is to pay, not, however, beyond the amount estimated and agreed upon.

4. The right of way to be obtained by the company and paid for by Chamberlain, he to be re-imbursed by them.

5. Chamberlain is to complete 62½ miles and place the necessary amount of rolling stock thereon, if required by the company, which is to belong to him until paid for. The road to St. Anthony to be completed and in operation with freight and passenger cars on or before the first day of January next, and the balance on or before the first day of November, 1860; the road to be operated 71 by the company. The rolling stock furnished by Chamberlain may, at option of the company, be retained and used in operating roads upon payment, monthly, of one-twelfth of its actual cost delivered on the road, with interest added, and not exceeding $25,000 per month for one year after completion of 62½ miles. Turn-tables and necessary buildings and fixtures for water stations, to be constructed by Chamberlain, at expense of the company, and as directed by the chief engineer.

The expense of operating constructions trains to be advanced by Chamberlain and charged to the company. At the expiration of one year from the time the rolling stock has been retained and used by said company, and upon payment of the monthly rent for its use, it is understood and agreed that the company may purchase all of said rolling stock for the sum of one dollar.

6. The present debts of the company incurred for the right of way and current expenses, to be provided for by placing 45 State bonds in the hands of a trustee to be converted into money, and the proceeds applied in payment of the debts, or that satisfactory guarantees shall be given by Chamberlain to Judge Nelson, that the warrants therefor shall be paid within 60 days.

72 7. The weight of the rail beyond St. Anthony to be reduced to not less than 45 and not to exceed 50 pounds per lineal yard, and the benefit of the reduction to enure to the company and not to Chamberlain.

8. The interest on the state bonds to be paid by Chamberlain until the completion of 62½ miles, such payments to be accounted for by the company.

9. The State bonds to which the company may be entitled to be paid to him as fast as received by the company from the State.

10. Provisions to be made as agreed upon for extraordinary expenditures, the amount to be ascertained by Messrs. Rice and Wells on part of this company.

11. All the debts due to Mr. Chamberlain, or to become due, for interest on monthly estimates, or cash advanced by him, or to be advanced, to be carried by him until the completion of his contract, unless the company may be able to pay them before that time.

The following resolution was unanimously adopted :

Resolved, That the officers of this company be instructed and authorized to frame and execute a contract by this company in accordance with the foregoing report, and the same when thus executed is hereby ratified and confirmed.

The Mr. Hatch mentioned in those proceedings is the plain-
73 tiff; the Mr. Chamberlain is the assignee of the bonds. I think
on my arrival at St. Paul I talked with the directors of the road, as I met them, about this contract. It was referred to at the meeting of the 29th of April. The assignment to Chamberlain executed by me was for value received. He paid no money; he gave his receipt for $45,000, to apply on his contract with the road; he was a contractor building the road. There is no other record of the proceedings of the board of directors besides the one now in court, nor aware of any entry in it enlarging my powers between April 21 and May 13th, 1859; there was a record of the executive committee. The assignment to Chamberlain was executed on the 13th, I think, during the meeting of the board. I was directed by the board to do it, and we went into one of the offices. The assignment from Chamberlain to Hatch was made immediately afterwards; the consideration was the settlement of an account between Chamberlain, myself, and Hatch. This assignment was originally to have been made from Chamberlain to me and from me to Hatch, but at my request was made to Hatch direct; Chamberlain owed me about $100,000, and I owed Hatch
about $30,000; we passed receipts in full. The only commu-
74 nication I made to Coddington & Co., after my arrival out and
down to this meeting of the board was my letter of April 30. I had no interviews with any members of Coddington's firm in New York; can't state what passed at the time of the execution of the papers at the St. Nicholas hotel; I knew what they were. I think I was present at a sale of these bonds in Minnesota, made an account of the Cedar Valley Rail Road Company; not positive.

Re-direct.

I came down from Minnesota in September or October, 1859, to get a return of these bonds from Mr. Coddington. I saw him at his place of business, and told him the object of my visit; said I had come to obtain the bonds; that as Mr. Newton negotiated the contract, all that I or the company knew of it, of their understanding, was through Mr. Newton, and that if he, Mr. Coddington, understood it, as we had been led to understand it, I thought there was no reason why he should not surrender the bonds and give up the contract. I understood the

contract to be made conditionally, and one of the conditions was the ability of the company to comply with it. The point that Mr. Coddington made was that the question should be referred to some
75 merchant. I replied that I did not know the merchants of New
York, and that there was really nothing to refer, if he understood the contract, the conditions on which it was delivered, as I did, and as the company did. I explained to him all that Mr. Newton said to the board of directors when the resolution was passed, and why it was placed in the form it was, but we did not seem to come to any point. I also told Mr. Coddington that I wanted to bring Mr. Newton to him, who was then in Orange, New Jersey, and talk the matter over face to face, and see if we understood it alike. Mr. Coddington enquired at parting if I would certainly return. I said I would and bring Mr. Newton. The bonds had been transferred by the company, and I felt bound to protect the assignees. That same evening I was served with judicial process at the suit of Messrs Coddington & Co. I did not have the further interview at that time. The resolutions of May 13 were passed subsequent to the execution of the assignment. The records don't show exactly all that occurred. I think Judge Nelson was in the chair at the time the contract was made.

(Defendant's counsel objected to any evidence in contradiction of the records as they stand. The court held plaintiff might explain then and overrule the objection to which decision the counsel for
76 the defendant then and there duly excepted.)

Witness resumes: These records were made up by a clerk or secretary. but don't appear to be signed by the president or secretary, I think Hatch was at the meeting in the morning and left as soon as the assignment was made.

(This evidence was duly objected to. The objection was overruled and defendant's counsel excepted.)

Re-cross.

I think I can swear positively that Mr. Hatch was not presen through the entire meeting. The two letters shown me are in my hand writing. Defendant's counsel here read in evidence letters from witness to T. B. Coddington & Co., dated July 9, 1859, another May 17th, 1859, as follows:

OFFICE OF THE MINNESSOTA & PACIFIC RAIL ROAD COMPANY.
St. Paul, May 17th, 1859.

Messrs T. B. CODDINGTON & Co.

GENTLEMEN: Enclosed please find an attested copy of a resolution passed on the 13th inst., by the board of directors of this company, in respect to the contract I made with you on the 22nd ulto.

Mr. Newton will leave for New York early next week, and will be able to explain the particulars of our inability to comply with the agreement.

It is not improbable that a satisfactory arrangement may be
77 made with Mr. Chamberlain, by furnishing him with iron for

our road. He will visit New York in a few weeks and will call to e you.

Very respectfully, your obd't serv't,

EDMUND RICE.

OFFICE OF THE MINNESSOTA & PACIFIC RAIL ROAD COMPANY,
St. Paul, July 5th, 1859.

Messrs T. B. CODDINGTON & Co., New York city.

GENTLMEN: I have duly received yours of the 28th ult.

When Mr. Newton left here for New York I handed him the duplicate contract made with you without retaining a copy. If you will have the kindness to forward me a copy, or in case Mr. Newton has the original, send that at your earliest, I will—on its receipt—send you a definite reply to yours of the 28th ulto.

In the meantime, I should be pleased to hear from Mr. Newton, and if you should happen to meet with him, may I ask the favor that you will show him this.

Yours, with much esteem,

EDMUND RICE.

78 There was but one contract with T. B. Coddington & Co.
The summons served on me was as president of the company, not against me personally. I furnished Newton with all the papers when he left for New York, under the resolution of May 13th, with the contract and the letter of credit; also with a letter of instructions of May 24th, I think; think I have not that letter; may have a copy with me. Furnished also an order signed by Mr. Nelson for the bonds. After Newton failed in his mission I wrote him to resign his agency. The contract was sent back to me before Mr. Coddington had written me that he had extended the time for compliance with the contract by the company and sent me a copy of the extension. I then wrote him that as I had returned all the papers through Mr. Newton to him, I was without a copy of the contract and requested him to send me one.

Edwin A. C. Hatch, called for plaintiff, being duly sworn testified as follows:

I am the plaintiff in this action. In 1859 and 1860 I was a part of the time collector of the port of St. Paul, and engaged in other business matters. From general information I consider the bonds in controversy worth par. I sold some for 60 cents in February, 1859.
I do not know their present market value in Minnessota
79 They were at one time, in 1859, worth par for banking purposes;
don't know that they are now. I was one of the board of directors of the Minnesota & Pacific Railroad Company. I don't recollect that I ever saw these resolutions before. I was not present; don't mean to say that I did not hear of a resolution of that tenor being passed. Mr. Newton was in St. Paul on the 13th May. I had some conversation with him on the morning that the board met; cannot say whether

before or after the meeting; I was there at the time the board met; can't say whether it was while board was in session; it was at that time.

(Defendant's counsel objected to evidence of these conversations. The Court overruled the objection, to which decision defendant's counsel then and there duly excepted.)

Newton stated that he felt very unpleasant on account of the probability of the contract not been carried out, as he had negotiated it for them; that his relations with Coddington were such that it made it very unpleasant, and he desired to go himself in person for the purpose of getting the contract and the bonds returned; that his relations with Coddington had been friendly, and he had no doubt whatever it would be released at once. I think this was while the board was in session.

80 On being cross-examined, witness testified: In May, 1859, Chamberlain was the contractor for the railroad; he lived in Cleveland, Ohio. I first learned of the contract about the time Newton and Rice returned; think by a dispatch; think the contract was talked over informally at the first meeting of the board, after they returned.

On the 13th of May I reached there about the time they were assembling; think before they transacted any business; only recollect being there; having some conversation with members transacting some business, and leaving. I don't remember being present when the resolutions in reference to an arrangement with Chamberlain, which appear by the records to have been passed, were read and acted upon. Remember there was some action of the kind; don't remember voting in it. I don't think the preamble and resolution in reference to the contract were read in my presence. I was then residing in St. Paul; meeting was held in the company'office, about a mile from my residence. I think I didn't see Rice or Chamberlain or Newton that day before I reached the office. I left very soon after going there. Don't know how long the meeting lasted. The transaction by which I became assignee of the bonds occured at the company's office; I think an office reserved for the use of the pre-
81 sident, not the room were the meeting was held; don't
recollect any one being present but Chamberlain, Rice and myself. Mr. Rice first proposed the assignment, I think; not certain whether it was he or Chamberlain; think the other directors were in session. It took eight to institute a quorum; there were fifteen in all, I believe; if there were only eight present, our absence would leave them without a quorum. I hadn't been pushing Rice for the payment of the debt; he owed me not very much; I can't tell the exact amount he owed me; had an account of a part of it—part of it—not some of it. I trusted to his account more than my own.

It was part of it for services managing different kinds of business for him, selling real estate, making entries on the books. I recollect one charge of $10,000 for services. I think I gave a receipt to Rice; don't think Rice gave any receipt to Chamberlain; not positive. I never owned any of these bonds before; never witnessed but one sale; that was in New York, in February, 1859; never bought any of these bonds or any others.

Renselear, R. Nelson, sworn for plaintiff, testified: I reside in St.
Paul; have been district judge of the United States since 1857.
Know the plaintiff; know the bonds in controversy; they
82 were in my possession. I received them from the governor of the
State ad interim, on the 3rd February, 1859. I know William A.
Nelson; I put these bonds in his possession, in March, 1859, with the letters of instructions already introduced; forty-five of them. I was acting president of the company in the absence of Mr. Rice, who was in New York. Newton never received any other or different instructions from me than this letter, nor any other authority from me, nor from the company, to my knowledge. I was present at the meeting of the board of May, 13th, and at some of the previous meetings; Newton was there; there was a great deal of discussion about the resolutions of May 13th. Newton stated openly in the board that if the resolutions passed, and he was sent to New York, he could obtain from Mr. Coddington the surrender of the contract, and the bonds; that he had been engaged in business matters with him, and that he was an old friend. This he stated openly to the board, and had stated previously to me.

I voted for the resolutions on that statement. I didn't like the
phaseology of them exactly, but on his statement, I voted for
83 them. In February or March, I sent the 100 bonds I received
from the State, to Rice, by Mr. Hatch, with instructions to
raise some money on them. He returned 85 of them to me, and vouchers and receipts for the sale of 15 @60 cents; this was before the 18th of March. I can only give my judgment as to the value of the bonds; know of no sales; my judgment is the State will pay the face of the bonds. In 1859 they were used in Minnesota for banking purposes; not aware they are now. The State received them, and issued currency to the banks, at 90 or 95 per cent of them.

Being cross-examined, witness testified: I was present at a sale, in 1861 or 1862, in which the bonds passed at 35 or 37 on private sale; this was in 1862; it was an actual sale. I received the money; only one or two were sold, with this exception. I was never present at any sale; I never bought any. Don't recollect when I first heard of the transfer of the 45 bonds to Camberlain; don't know that I did on the 13th May; don't think I ever saw the transfer till on a former
trial, in November, 1865; I know they were transferred, and a
84 receipt given to Chamberlain; was told so by the president;
but the transfer I don't think I ever saw till last November.
When Newton came to New York to procure a surrender of the bonds, I think I give him a order on Mr. Coddington to deliver them up. I don't think I have the order or a copy of it; can't say whether the paper shown is a copy.

Re-direct.

I think I also gave Rice an order on Mr. Coddington.

Plaintiff here rested.

Defendant, further to prove the issues on his part, recalled William H. Newton, who testified as follows: I was one of the executive committee, as well as a director. The paper shown me is a copy of the order judge Nelson furnished me on leaving Minnesota.

(Read in evidence.)

OFFICE OF THE MINNESOTA & PACIFIC RAILROAD COMPANY,
St. Paul, *May* 14*th*, 1850.

Messrs. J. B. CODDINGTON & Co.

GENT'S: You will please deliver to Messrs. Rice or Wm. Newton forty-five Minnesota State 7 per cent. bonds of the denomination of $1,000 each, now in your hands, issued by the State to Minnesota & Pacific R. R. Co., said bonds belonging to the Railroad Co.

85 Very respectfully, yours,

R. R. NELSON,
Acting Pres't of. M. & P. R. R. Co.

Defendant's counsel here offered in evidence a letter written by defendant to Newton, as special agent, dated June 19, 1859.

(Objected to by plaintiff's counsel. The objection was sustained by the court, and defendant's counsel duly excepted.)

Cross-examination.

I made this copy order in 1859, when I returned the original.

Thomas B. Coddington, being duly sworn, on behalf of defendant, testified:

I am the defendant; have been merchant in New York 30 years. I know Newton; he came to New York in the spring of 1859 in reference to the contract. I met Rice in the fall following; I had seen him before. When Rice called in October, 1859, it was at our office late in the day; just before we left we had a short interview. He stated that he had called to make some arrangement for the cancelling of the contract and in regard to the bonds which Mr. Newton had previously failed to accomplish. I stated to him that I had told Newton that the measure of damages that I proposed to Newton to settle with him, by charging him with the difference between the contract price and the market price then realized for the iron;
86 and I think I told him also that we had offered, as we had done, to allow an additional five per cent. on the whole transaction, five per cent. besides the difference in price in consideration of our not having to carry out the contract. I stated to him that I had offered to Newton to submit what the difference in price should be to the other parties. He stated that he thought we could settle it ourselves, and there would be no occasion to go to other parties. The further conversation was to the effect that he would call again

in regard to the matter, and that he would see Newton, and he then left. There was not a word said about any transfer having been made of these bonds. The only thing said about a transfer was in regard to the forty bonds which had been transferred to Chamberlain before he got out there. As to the forty-five bonds, he never intimated that there was any claimant for them but the company. He did not allude to any conversation or instructions which he had given to Newton, that the delivery of the contract was conditional; anything of that kind was never said to me.

Cross-examined.

87 I said to Rice that I wanted to refer it to some merchant to ascertain what the market price was, that we might know the measure of damages. Rice didn't say that, as between honest men, he thought there was nothing to refer; not a word of it; on the contrary, he admitted the liability.

The testimony here closed.

Defendants' counsel made the following requests for directions to the jury:

First. The defendants request the court to instruct the jury to find for the defendants.

If the cout declined so to direct defendants, then request the court to charge—

Second. The contract of April 21, 1859, was properly executed in form to bind the company; and if there were any private instructions to Rice or Newton from the company not communicated to defendants, they did not impair the authority of Rice in respect to the defendants.

Third. The acts of the board of directors of the company, on being informed of the contract, were a requisition of its validity.

Fourth. The jury should disregard all oral evidence to effect the meaning or effect of the records of the board of directors.

88 Fifth. The transfers from the company by Rice to Chamberlain and by Chamberlain to Hatch, of the bonds described as being in possession of defendants, were notice to [to] the transferees of some title on the part of the defendants, and plaintiff is estopped from alleging the invalidity of such title.

Sixth. The assignments to Chamberlain and Hatch, having been made for the private interests of Reed and Hatch, were invalid to transfer any title from the company.

Seventh. Defendants' refusal to deliver the bonds on the demand of Aymar, on the ground stated by him, does not amount to a conversion, as the plaintiff has not established the invalidity of the decision referred to by Mr. Coddington.

Eighth. The contract being absolute in terms, and the exchange and delivery of the papers being evidenced by writing, the jury should disregard all oral evidence that the delivery was conditional.

Ninth. That there is no evidence in the cause of any fraud on the part of the defendants.

Tenth. That the jury must disregard all evidence of the value of the bonds in question other than testimony as to market value.

Eleventh. They must disregard all evidence of market value in the city of New York.

The court then charged the jury as follows:

89 **Gentlemen**: I shall call your attention very briefly to what
I consider the main and controlling questions in the case, upon which the rights of these parties, both in face and in law, depend. You have already learned that this is an action of trover, to recover the value of forty-five bonds of the State of Minnesota, of $1,000 each. The assignment of these bonds from the Minnesota & Pacific Railroad Company, who received them from the State, to the plaintiff, has been given in evidence, vesting the title in the plaintiff, E. A. C. Hatch. The bonds were assigned on the 13th May, 1859, and a demand was made on the defendants for them October 30, 1860. If, however, it should turn out, upon the evidence in the case, and upon the law applicable to it, that these defendants never acquired any title to the bonds by virtue of the contract which had been given in evidence, then the right of action on the part of Hatch, the plaintiff, to recover, existed at the time of the assignment, and if he is entitled to recover at all, he would be entitled to recover the value of the bonds, whatever that may be in your judgment, with the interest from that time down to the present; or if the right of action did not accrue against the defendant without a demand, then the interest would be from the time of the demand. Now, the great question in
this case, is not about the title of these bonds in Hatch, or in
90 this company, or in Chamberlain; that is not the question in
this case involving the merits of the controversy. This question turns [turns] upon the defence that has been set up against this claim; for if the defendant has not title to these bonds it is no great matter to him whether the beneficial interest, in point of fact, is in the company or is in Hatch; if Hatch has the formal legal title, that is sufficient. Upon this idea we do not think, therefore, that it is material for you to trouble yourselves much about the title that Hatch derived from this company.

Now, if the plaintiff is entitled to recover, there is a preliminary question that it will be necessary for you to look into, as to the value of these bonds, and as to the rule of damage applicable to this class of securities. The plaintiffs, in an action of this kind, where he has been wrongfully deprived of his property and seeks a remedy against the wrong-doer, is entitled to recover its value at any period from the time that the title accrued against the wrong-doer down to the
trial, and may select any period of time when its value is the
91 highest, from the time the right accrues down to the trial;
and according to the testimony on this branch of the case, there is evidence that these bonds, in the year 1859, for banking purposes, were worth in Minnesota 95 per cent., and as applicable to the payment of debts, they were at par in the year 1859; that in this city, in that year, or the year 1860, I think they were sold at 60

cents the dollar. The highest in this city was 60; the highest in Minnesota, par, or 95; and whatever value you may fix upon, if you come to the conclusion that the plaintiff is entitled to recover at all, you will add the interest to that sum, from the time that the title of the plaintiff accrued, which was in May, 1859, down to the present time.

This, gentlemen, is a very singular case. It has some features that I think do not often make their appearance in a court of justice, and must strike every individual concerned in the administration of justice, with some surprise. What is it? There was a contract, as claimed on the part of the defendants, made the 21st of April, 1859, with the railroad company; it has been read to you; a contract for the delivery of 85 bonds, of the State of Minnesota, on the one side,
by the company to the defendants, $85,000; and on the part
92 of the defendants, they were to advance $16,000 in cash, and
to furnish iron at the rates designated in the contract for the remainder of the consideration of the $85,000. Forty-five of these bonds were delivered at the time of the execution of the contract, at par, $45,000. On the 30th of April, 9 days after the contract was made, a letter was written from one of the company in Minnesota to the defendant, giving notice to him that the contract could not be carried into effect. It might take, perhaps, a week to reach def't; some fifteen days or half a month after the contract was entered into. Now, what is the condition of the litigation in this case. The record that has been admitted on the part of the defendants shows that he recovered in the fall of 1859, a judgement of fifty-odd thousand dollars against the railway company on this comtract, and it is now claimed, on the part of the learned counsel for the defendants, that in addition to that judgement for damages, he is entitled to retain also these bonds—$45,000; making in all $95,000. Now, what has been paid for this sum? Substantially nothing. The defendant has the
judgement for $50,000 and odd; no iron has been delivered,
93 nor money paid. I was struck when that record was pro-
duced in evidence. How it could be that such an amount of damages had occurred, even assuming that there was an actual breach of contract, how they could have occurred during these fifteen days, especially when nothing had been done under the contract. Now, gentlemen, I will call your attention, very briefly, to the merits involved in this defence. It is claimed on the part of the plaintiff that this contract of the 21st of April, 1859, was delivered conditionally upon two conditions. First, that it must be approved by the company at Minnesota; and secondly, that if the 40 bonds in the hands of Mr. Nelson, at St. Paul, were disposed of before they were advised of this contract, then the contract was not to take effect. It is stated by Mr. Rice those were all the bonds of the State that the company possessed; and if the 40 had been disposed of before they were advised of this contract, it would have been impossible to have carried it into execution; and upon this ground he says it was made a condition, in express terms, and that Mr. Newton was not authorized to deliver the contract upon any other. Now, if

94 this be so, there was no delivery of the contract; and as this is a question of fact, depending upon the testimony of Mr. Rice and Mr. Newton, Mr. Newton states that he has no recollection of any condition being annexed to the delivery. He is not very clear about it; no recollection. Mr. Rice swears expressly that those conditions were annexed to it, and that those were the instructions that were given him (Newton) at the time he took the contract for the purpose of delivery. The testimony of Newton is negative; it is the absence of recollection; the other is positive, affirmative testimony. These two kinds of evidence when compared, or when put in opposition—the witnesses being equally intelligent and equally honest—the one who testified affirmatively to the existence of a fact, and who could not well testify it without being guilty of perjury if untrue, is entitled to the most credit. Now, gentlemen, if on weighing this answer, you can come to the conclusion that this contract was delivered conditionally with the two conditions annexed to it, stated by the witness, then there was no delivery. It required no notice on the part of the person to whom it was delivered, 95 of the conditions in order to give them effect; the party delivering it must have authority in order to vest any right in the party to whom delivered. A circumstance that has made some impression upon my mind is stated in the letter of Mr. Rice, of the 30th of April, 1859, nine days as you see, after the contract was made, in which he advised the defendants that the contract could not be carried into execution. The reason assigned is that these forty bonds that were required by the contract to make up the 85 had been disposed of before the company had notice of it, thus assigning the condition which he states was in fact annexed to the delivery as the reason why the contract could not be completed. There is one other point to which I will ask your attention. It is not in dispute here that Newton himself had no authority from the company; Rice had no authority. It is indeed insisted by the learned counsel for the defendants that a resolution that was passed by the board in July, 1858, about a year previous contained authority to make this particular contract. I have looked into it and advise you that no 96 such authority is contained within it; it relates wholly to a different subject to the negotiation of the first mortgage bonds and to the appropriations of the avails of them. Rice, therefore, had no authority to execute this contract; and this is an additional ground of want of authority from the one I have just called your attention to. The one was that the contract was delivered conditionally on those two conditions, which if not complied with the contract was not to be binding; that is one ground. The other is, that neither of the parties engaged in making the contract with the defendants had any authority to make it, unless it was subsequently ratified by the company. Then it is alleged that it was so ratified, and that involves a consideration of the resolution of the 13th of May, so much commented upon by the learned counsel on both sides. The judge read the resolution and said there is no confirmation in it. A confirmation would have been a very simple resolution, an approval of the con-

tract. There is no approval here, but, on the contrary, there is a suggestion that it is a contract that can't be carried into execution, the
very fact which was communicated to the defendant the 30th
97 of April preceding, and they appoint Mr. Newton, the agent,
to go and procure the surrender of these bonds and of this contract which thus failed for want of authority upon equitable and reasonable terms. That is the burden of that resolution, and you learn from those that were present why it was passed through the importunity of Mr. Newton, who, from his previous association with and knowledge of the defendants, particularly Mr. Coddington, had a settled conviction, that if he was selected as the agent, there would be no difficulty in getting this surrender. That explains the terms of this resolution and the reasons for it; not confirmation, but a desire for an amicable adjustment of this unfortunate controversy that had resulted in the non-execution of the contract, and this friend was selected for the purpose of bringing it about. I must say, gentlemen, that I have been so struck with the peculiar features of this transaction that I had almost made up my mind to rule the case absolutely
upon the ground that the party had rescinded the contract by
98 his suit for damages for a breach of it, and which gave to the
other party a right to recover back the consideration; but it has been tried once before, and I prefer therefore to place it upon the facts in the case; to place it upon the question of authority in making this contract, and put that question to you to determine on the facts of the case. If you come to the conclusion that here was no authority, and that therefore no title to these bonds passed to the defendants, then your verdict will be for the plaintiff for the value of these bonds with interest from the time you may designate; and as I have already stated to you, you have a right, indeed you are bound in duty, to take the highest price that these bonds stood at in the market at any time from the time the right of action accrued down to the trial.

The court stated to defendant's counsel that all of his prayers not embraced in the charge were excluded, and defendant's counsel duly excepted severally to the courts refusal to charge as requested.

Defendant's counsel also excepted to the instruction, that if defendants never acquired any title to the bonds, plaintiff could recover their value at the time he acquired title with interest from that
date.
99 Also to the instruction that the jury might take into consid-
eration the value of the bonds in Minnesota for banking purposes and for the payment of his debts.

Also to the instrtuction that Rice had no authority to execute the contract.

Also to the instruction that the resolution of May 3th, 1859, was not a ratification of the contract.

The jury returned into court with a verdict for the plaintiff for the value of the forty-five bonds, at 60 cents on the dollar, with interest from the 7th May, 1859.

And because none of the said exceptions so offered and made to the opinion and decision and instruction of the said circuit judge do appear upon record of the said trial, therefore, on the prayer of the said defendant by his counsel, the said circuit judge hath to this bill of exceptions put his seal this twelfth day of April, one thousand eight hundred and sixty six.

[L. S.] (Signed) S. NELSON.

Endorsed: Bill of exceptions.

100

101 The people of the State of New York, by the Grace of God, free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye, that having examined the records and files in the office of the clerk of the county of New York, and clerk of the Supreme Court of said State for said county, do find a certain judgment roll, referee's report of sale, and notice to docket there remaining, in the words and figures, following to wit:

[SEAL.]

N. Y. Supreme Court.

THOMAS B. CODDINGTON, EDWARD S. SHERMAN, George L. Nichols, and Henry Nash, plt'ffs.,
ag'st
THE MINNESOTA & PACIFIC RAILROAD COMPANY, def'ts.
Summons for relief. (Com. not served.)

To the above-named defendants:

102 You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the city and county of New York, at the city hall in said city, and to serve a copy of your answer to the said complaint, on the subscribers, at their office, No. 7 Nassau street, (Continental Bank Building,) in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated 20th Oct. 1859.

SPIER & NASH,
Plaintiffs' Attorneys.

N. Y. Supreme Court.

THOMAS B. CODDINGTON, EDWARD S. SHERMAN, George L. Nichols, and Henry Nash,
ag'st
THE MINNESOTA & PACIFIC RAILROAD COMPANY.

CITY AND COUNTY OF NEW YORK:

103 Thomas B. Coddington, Edward S. Sherman, George L.

Nichols, and Henry Nash, plaintiffs, complain against the Minnesota & Pacific Railroad Company, defendants, and allege—

First. That the plaintiffs are and were, at the time of the transactions hereinafter stated, partners in business in the city of New York.

Second. That defendants are and were, at the time of the transactions hereinafter stated, as plaintiffs are informed and believe, a body politic and corporate, existing under and by virtue of the laws of the State of Minnesota.

Third. That on or about the 21st day of April, 1859, a contract, in writing, was duly made and executed, by and between the plaintiffs and defendants, in the city of New York, of which the following is a copy.

[Here insert the contract of April 21st, 1859, set out in the case.]

Fourth. That upon the execution of said contract an amount of only $45,000 of the Minnesota State bonds, mentioned therein, was deposited with plaintiffs, instead of the amount of $85,000 of said bonds named in said contract, the defendants agreeing to deposit the residue as soon as they could be forwarded from Minnesota.

104 Fifth. That as soon as the said contract was executed by and between the parties as aforesaid, plaintiffs proceeded to make arrangements for the performance of the same on their part, and on or about the 29th of June, 1859, notified the said railroad company, the defendants, in writing according to the provisions of the said contract, that they elected to make the contract, one for three thousand tons of iron, delivered as expressed in the contract, and having been informed by the defendants of some difficulties in the way of the fulfilment of the contract by them, and the said defendants being then in default in not having deposited the remaining $40,000 of the $85,000 of bonds mentioned in said contract, plaintiffs in and by the said written notice further notified the defendants, that on their making up their deposit of bonds to the amount required by the contract, they, the said plaintiffs, would hold themselves in readiness to proceed on their part.

Sixth. That defendants have not deposited any of the said bonds, except the amount of $45,000 deposited upon the delivery of the contract, and have finally renounced the said contract on their part, and refused to carry out the same.

105 Seventh. That plaintiffs have been ever since the execution of said contract, and are now, readyand willing to perform the contract on their part; that they have ready for delivery, and have offered to deliver, to said defendants the first one thousand tons of iron mentioned in the said contract, on the performance of the stipulations of the said contract by the defendants on their part to be performed, and are ready, able, and willing to go on and perform the said contract according to the terms thereof in respect to the other two thousand tons of iron therein mentioned; but that defendants have utterly renounced the said contract, and refused to perform the same in any particular.

Eight. Plaintiffs further allege, that by the said renunciation of the said contract by the defendants, and their refusal to go on with the same, plaintiffs have sustained damages to the amount of fifty thousand dollars.

Ninth. Plaintiffs further allege, that defendants have no property within this State to the knowledge of plaintiffs, except the $45,000 of Minnesota State bonds, deposited with the plaintiffs as aforesaid; that plaintiffs are still in the possession of the said bonds, but have taken no proceedings to sell the same; that the said bonds have
106 no recognized market value, and will not, at public sale, as plaintiffs are informed and believe, sell for enough to pay plaintiffs' damages, nor for anything like their par value; and plaintiffs are fearful that if they sell the same at public auction, according to the terms of said contract without being allowed to bid upon and purchase the same, they will be obliged to part with the said bonds at much less than their real value.

Wherefore plaintiffs demand judgment, that they may recover against the defendants their damages aforesaid, and that the said forty-five Minnesota State bonds of $1,000 each may be sold under the directions of this court, and that plaintiffs may be allowed to bid upon such sale and purchase, the said bonds or any part of them on their own account, and that out of the proceeds of such sale plaintiffs may be paid their damages as aforesaid, as far as the said proceeds will go, and that plaintiffs may have judgment against the defendants for the deficiency with costs, and that the defendants, and all persons claiming by or under them, may be barred and forclosed of all equity of redemption in the said bonds, and that plaintiffs may have such other or further relief as to the court may seem meet.

SPIER & NASH,
Att'ys for Pl'ffs.

107 CITY AND COUNTY OF NEW YORK, *ss:*

T. B. Coddington, being duly sworn, saith, that he is one of the plaintiff's in this action, and that the foregoing complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those he believes it to be true.

T. B. CODDINGTON.

Sworn to before me this 29th day of Nov., 1859.

JOHN S. AMES.
Comm. of Deeds.

N. Y. Supreme Court.

THOMAS B. CODDINGTON, EDWARD S. Sherman, George L. Nichols, and Henry Nash,
agst.
THE MINNESOTA and PACIFIC RAIL Road Company.

The defendants, the Minnesota & Pacific Railroad Company, answering to the complaint in this action, say:

First. They deny that the contract of which an alleged copy is set

forth in the complaint, or any like or similar contract, or substantially the same, or any contract whatever providing for the sale or delivery to the plaintiffs of any Minnesota State bonds was ever made,
108 executed, or delivered by them or by or under their authority, or that they ever sanctioned or ratified, assented to, accepted the same, or any like or similar contract, or any contract substantially the same.

Second. The defendants admit and aver, that at the time of the alleged contract set forth in the complaint, purports to have been executed, Edmund Rice, whose signature appears thereto, was the president of the defendants, and that he signed the same, but without any authority from defendants, as the plaintiffs then well knew; that the said alleged contract was signed and delivered by the said Rice, and the plaintiffs in the city of New York, at or about the time it bears date, and that the residence and place of business of these defendants then was and now is the State of Minnesota; that at the time of the execution of the said alleged contract, forty-five bonds of the State of Minnesota, for and of the value of one thousand dollars each, belonging to the defendants, being the bonds mentioned in the complaint, were deposited with, or placed in the hands of, the plaintiffs, without any authority whatever from the defendants, as the plaintiffs then well knew, which deposit and delivery the de-
109 fendants have never assented to, accepted, or ratified, and that all of the said bonds are, as the defendants are informed and believe, still in the hands of the plaintiffs; but the defendants deny that they ever deposited any bonds with the plaintiffs, or agreed to deposit other bonds to the amount of $40,000, or any other sum, as soon as they could be forwarded from Minnesota, or at any time.

Third. Upon information and belief the defendants deny that the plaintiffs ever proceeded to, or did make arrangements for, the performance of the said alleged contract on their part, or that the plaintiffs are, or have ever been, ready and willing to perform the said alleged contract on their part, or that they have, or have ever had, ready for delivery to the defendants the first one thousand tons, or any portion of the iron mentioned in the said alleged contract, or that the plaintiffs on or about the 29th of June, 1859, or at any time anterior to the 2d day of July, 1859, notified the defendants, according to the provisions of the said alleged contract, or otherwise, that they elected to make the said alleged contract one for three thousand tons of iron, or that they, the said plaintiffs, would hold them-
110 selves in readiness to proceed, on their part, upon the defendants making up their deposit of bonds to the amount required by the said alleged contract.

Fourth. The defendants further say, upon information and belief, that the plaintiffs have not performed the conditions of the said alleged contract, nor any part or portion thereof, nor have they sustained any damages by reason of the alleged refusal of the defendants to go on with the said alleged contract, or their alleged renunciation of the same.

And for a further answer to the complaint in this action, the defendant says, that a short time previous to the date of the said alleged contract, the said company placed in the hands of William H. Newton the Minnesota State bonds for forty-five thousand dollars mentioned in the complaint, then belonging to the defendants, to raise money upon by the sale or hypothecation thereof, by money to be received by the said Newton at the time of such sale or hypothecation for the defendant's benefit, and for no other purpose whatever,
111 and that neither the said Newton, nor any person or
persons, other than the defendants, then or thereafter, had any power or authority to dispose of or part with the said bonds, except for the sole purpose of selling them for money, or pledging the same to secure the payments of money, which might be loaned thereupon to the said company; that, as these defendants are informed and believe, the said Newton, after the said bonds were so placed in his hands for the purpose aforesaid, came to the city of New York, and claiming and pretending to act as the agent of and for and in behalf of defendants, applied to the plaintiffs and requested them to loan to the defendants the sum of sixteen thousand dollars, and to receive as security therefor the said State bonds; that the plaintiffs declined to make the said loan upon the said bonds, but at the said time offered and proposed to the said Newton and Edmund Rice, president of said company, that if, and in case the said Rice should, and would, in the name of, and for and on behalf of the defendants, make and enter into a contract with the said plaintiffs, providing for the sale by the plaintiffs of three thousand tons of railroad iron at a price greater than
112 the real value thereof, upon certain conditions, so that the
plaintiffs would be enabled to make a large profit upon the said iron than was usually obtained therefor, similar in its provisions to the alleged contract set forth in the complaint thereof, the said plaintiffs would enter into such contract, and would, in consideration thereof, loan to the defendants the said sixteen thousand; that the said Rice and Newton then assented and agreed to, and accepted the said proposal and offer; and thereupon, and at the same time, or immediately after the said Rice and the plaintiffs, under and in accordance with the provisions made and signed, and delivered to each other the alleged contract set forth in the complaint; and at the same time, and in further compliance with the provisions of the said offer and alleged contract, and in consideration thereof, and not otherwise, the said Newton delivered to the said plaintiffs the $45,000 of Minnesota State bonds in the complaint mentioned, and that no money or thing of value has at any time been loaned, paid, or advanced to the said defendants, or the said Newton, by the plaintiffs,
113 for and in consideration of such delivery of the said bonds
or of the making and delivery of the said alleged contract or otherwise; that at the time the said offer of the plaintiffs was so made and accepted by the said Rice and Newton, and when the said alleged contract was so signed and delivered, railroad iron, of the kind described in the said alleged contract, was not, and has not since been, worth sixty dollars per ton by the thousand tons in the

city of New York, nor more than forty-seven dollars per ton, and that, when the said alleged contract was signed, the plaintiffs well knew that the value of that description of iron did not exceed forty-seven dollars per ton.

And these defendants aver in like manner that the intention and design of the plaintiffs, and of the said Rice and Newton, at the time the said offer was so made and accepted, and when the said alleged contract was so signed and delivered, was to secure to the said plaintiffs, by means of the said alleged contract, a greater rate of interest or compensation for the said sixteen thousand dollars and the loan thereof, than the interest thereon at and after the rate of seven per cent. per annum, and that such greater rate was
114 and is thereby provided for and secured, and that such alleged
contract is, and when so signed and delivered was, usurious and void; that, as the defendants are informed and believe, when the said alleged contract was so signed and delivered, and when the said bonds were so placed in the hands of the plaintiffs, the plaintiffs were informed and well knew that the said Rice had no power or authority to make or execute the said contract for and on behalf of the said defendants, and neither the said Rice nor the said Newton had any power or authority from the defendants to deliver the said bonds to the plaintiffs.

And for a further answer the defendants say, that since the commencement of this action, an action has been instituted in the Superior Court of the city of New York against these defendants by the above-named plaintiffs, embracing and the complaint in which set forth substantially the same facts and subject matter, and the whole thereof, and no more than are contained in the complaint in this action; and that the said plaintiffs claim in their said complaint in the Superior Court to recover from these defendants the
115 sum of fifty thousand dollars for damages alleged in the said
last-mentioned complaint to have been sustained by the said plaintiffs by and in consequence of the alleged failure of the defendants to perform the conditions of the alleged agreement set forth in the complaint in this action, and in the said action in the Superior Court; that the answer of the defendants in the said last-mentioned action was duly served upon the attorney of the plaintiffs therein days before the complaint of the plaintiffs was served in this action, and that the said action in the Superior Court is now at issue, and has been noticed for trial at the January term of the said Superior Court; wherefore the defendants pray to be hence discharged, with their reasonable costs.

Dated New York, 19 December, 1859.

BARBOUR, LEE & SMIDT,
Att'ysr of Def'ts, 10 *Wall st.*, *N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

Franklin Steele, being duly sworn, deposes and says, that he is a director and one of the officers of the Pacific Railroad Com-
116 pany, the defendants above named; that he has read the

above answer, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

FRANKLIN STEELE.

Sworn this 6th day of January, A. D. 1860, before me.

IRA H. TUTHILL,
Notary Public.

N. Y. Supreme Court.

Thomas B. Coddington *& al.*
vs.
The Minnesota & Pacific Railroad Company.

At a special term, at chambers, at the city hall, in the city of New York, June 5th, 1860. Present: Hon. Benj. W. Bonney, J.

Upon reading and filing the consent of Barbour, Lee & Smidt, esquires, attorneys for the defendants herein, and on motion of Spier & Nash, attorneys for the plaintiffs, it is ordered that the above-entitled cause, and the issues therein, be referred to
117 Thomas H. Rodman, esquire, of the city of New York, to hear, try, and determine the same.

A copy.

JOHN CLANCY, *Clerk.*

N. Y. Supreme Court.

Thomas B. Coddington and others
agst
The Minnesota & Pacific Railroad Company.

I, the referee, to whom it was referred by an order of this court to hear and determine the issues in this action, do respectfully report to this court that I have been attended by the counsel of the plaintiffs and defendants, and have heard their proofs and allegations, and I do find as facts that, on or about the 21st April, 1859, the contract in writing set forth in the complaint in this action was executed by and between the plaintiffs composing the firm of T. B. Coddington & Co., therein named, and the said defendants; that the said contract was executed by the said Edmund Rice for
118 and on behalf of the defendants, the Minnesota & Pacific Railroad Company, of which the said Rice was then president, under and by virtue of certain resolutions of the board of directors of the said Minnesota and Pacific Railroad Company, of which the following is a copy.

Minnesota & Pacific Railroad Company,
Secretary's Office.

At a meeting of the board of directors of the Minnesota & Pacific Railroad Company, held at the office of said company, in Saint Paul, on the 13th day of July, 1858. Present: Messrs. Woodbury, Bunce, Rice, Newton, Burton, Thompson, Hatch, and Lynde, the following resolutions were adopted:

Resolved, That this company hereby authorize and direct the execution, on the part of the company, of the first mortgage deed, the form of which was approved by resolution of this board, dated June 28th, 1858.

And whereas, the interests of the Minnesota & Pacific Railroad Company require that no default in the performance of the conditions under which the credit of the State of Minnesota has been loaned to this company shall occur, and that means shall be
119 promptly provided with the aid of said loan of State credit, to construct one hundred miles of road at an early day, thereby vesting in the company the right to sell unconditionally three hundred and eighty-four thousand acres of land; therefor—

Resolved: That Edmund Rice, president of the Minnesota & Pacific Railroad Company, or any agent or agents duly appointed and substituted by him, in writing, to execute the trusts and powers conferred by this resolution, be, and are hereby, authorized and empowered, in pursuance of section twenty-one of the charter, to sell, loan, pledge, hypothecate, or otherwise dispose of, the first mortgage bonds of the company, in conformity to the provisions of the trust mortgage deed of said company at par, or any price less than par, and for such sum or sums as to the said Rice, or agents appointed by him, shall appear most for the interest of the company. And the said president, or such agent or agents as he may appoint, is, and are hereby, authorized to borrow such sum or sums of money for such length of time, and for such rate of interest as to him or such agent or agents may seem proper, for and on behalf of the company; and also to purchase such quantity of iron, rails, locomotives, cars,
120 tenders, rolling stock, and machinery for said road, and upon such terms as he or such agent or agents may deem advisable; and to make, execute, and deliver in the name and in behalf of said company such obligations, bills of exchange, contracts and agreements, in writing, as will anable him, or such agent or agents to carry out the powers and authority above conferred upon him and them, making monthly reports to the board of his acts in the premises, all which acts thereunder done are hereby ratified and confirmed.

Provided: That the whole amount of obligations to be incurred on behalf of the company under this resolution shall not exceed the sum of seventeen hundred and fifty thousand dollars.

A true copy from the minutes.

Attest:

[L. S.] JAS. W. TAYLOR,
Secretary.

That on the execution of said contract, the said Minnesota State bonds therein mentioned, to the extent only of $45,000, were deposited with the plaintiffs, and no more were ever deposited with

them; that three promissory notes, all dated New York, April 21, 1859, one for six thousand dollars, and two for five thousand
121 dollars each, all payable to the order of the plaintiff's firm of T. B. Coddington & Co., six months after date, with interest at seven per cent. per annum, at the banking-house of Duncan, Sherman & Co., in the city of New York, made by the said Edmund Rice, as president of the said defendants, were at the time the said contract was executed, also delivered by him to the said plaintiffs, together with a letter signed by himself, as such president, of which the following is a copy:

SAINT NICHOLAS HOTEL,
New York, 21st April, 1859.

Messrs. T. B. Coddington & Co.

DEAR SIRS: In conformity with an agreement made with you this day, I hand you, by Mr. William H. Newton, forty-five thousand dollars of Minnesota State bonds, and will send you without delay a further amount of forty thousand dollars of like description, State bonds as collateral, and for negotiation as per same agreement.

I also hand you our three notes bearing this date, at six months, with interest at seven per cent, one for six thousand dollars and two for five thousand dollars each, in all sixteen thousand dollars, against which you will please grant a letter of credit for sixteen
122 thousand dollars in favor of Mr. Wm. H. Newton, stipulating that on your receiving the remaining forty thousand dollars of bonds above referred to you will accept draft drawn by him at one day's sight on you.

I am yours, very respectfully,

EDMUND RICE.
Pres't Min. & Pacific Railroad Company.

That the said Edmund Rice, as such president, on the 30th April, 1859, addressed to the plaintiffs a letter, of which the following is a copy:

OFFICE OF THE MIN. & PAC. R. ROAD COMPANY,
St. Paul, April 30th, 1859.

T. B. Coddington & Co. New York.

GENTLEMEN: I found upon my arrival here that the acting president of this company had disposed of the forty Minnesota State bonds, which were to have been forwarded to you by the terms of the contract made between us in New York. You will perceive, therefore, that it is impossible for the company, at the present time, to comply with its undertaking. Some action of the board of directors will be had upon the subject, of which I shall take
123 pleasure in advising you at the earliest moment.

Very respectfully, y'r ob't servant,

EDMUND RICE,
Pres't Min. & P. R. R. Co.

T. B. CODDINGTON, *New York*.

That on the 7th June, 1859, the defendants, by their special agent, Wm. H. Newton, addressed a letter to the plaintiffs, of which the following is a copy:

NEW YORK, *June 7th* 1859.

Messrs. T. B. Coddington & Co.

GENTLEMEN: I am, by a resolution of the board of directors of the Minnesota & Pacific Railroad Company, adopted May 17th, 1859, authorized to secure a surrender of the company's contract, made by the president, Edmund Rice, esq., with your firm, under date of April 22d, 1859, upon such equitable terms as may be agreed upon.

In compliance with the request of Edmund Rice, esq., under date of May 24th, as president, I would briefly state the circumstances which have arisen in the affairs of the company, whereby it
124 has become impossible to comply with the terms of this contract. On the execution of the contract, Mr. Rice immediately telegraphed to R. R. Nelson, acting president at St. Paul, to retain the $40,000 State bonds (as an arrangement had been made here) to carry out the contract with you. Mr. Rice, leaving for St. Paul the following morning for the purpose, and fully expecting to comply with the provisions of the contract by forwarding the bonds then in the possession of the company. On arriving at St. Paul, at an interview with Judge Nelson, he approved of the contract, but stated that he made a partial arrangement with Selah Chamberlain, esq., to advance money to the company, and had paid over to him the bonds referred to, to be applied in payment for work upon the road; therefore it could not be carried out unless Chamberlain would surrender them, or the company could have an extension of time sufficient to grade ten miles of road bed, and obtain $100,000 State bonds with which to comply with the provisions of this contract. Upon this suggestion I wrote you, and your letter of the 6th of May, extending the time ninety days, was received. Up to this time it was the opinion of the board that there was no contract ex-
125 isting with Mr. Chamberlain to prevent its adoption.

A meeting of the board of directors was held; the contract with you was presented for approval; action upon it was deferred until the legal relations of the company with Mr. Chamberlain were decided upon by the counsel of the company. At the next meeting of the board of directors negotiations were entered upon with Mr. Chamberlain for a new or supplemental contract, which resulted in terms being agreed upon for completing and stocking sixty-two miles of their road, and upon the passage of the resolution, (a copy of which is enclosed,) no further notice or action was had in relation to the contract with you, as I did not approve of the future policy of the company as instituted by this contract with Mr. Chamberlain. I then requested the president to accept my resignation as director, which was tendered and accepted at the next meeting of the board.

I was, as the special agent of the R. R'd company, requested to obtain the surrender of the contract and bonds, and have here your letter of credit and contract for that purpose, with the accompanying

papers. You will please inform me at your earliest convenience upon what terms you will cancel and surrender this contract; also,
126 if you will deliver the bonds in your hands upon the order of R. R. Nelson, as acting president, a copy of which is herewith endorsed.

Very respectfully, your ob'dt ser'vt,

WM. H. NEWTON,

As special agent for Minnesota & Pacific Railroad Company.

That on the 29th June, 1859, the plaintiffs addressed and mailed at the city of New York, to the president of the defendants, at St. Paul, a letter of which the following is a copy:

NEW YORK, *June* 28th 1869.

EDMUND RICE, Esq.,

Pres't of the Minnesota & Pacific Railroad Co., St. Paul, Minn.

DEAR SIR: You will please to take notice that before we were informed that your company would not be able to carry out the contract with us for railroad iron, bearing date the 21st day of April last, we had made arrangements for iron to some extent, with the view and intention of giving you the notice prescribed by the contract so as to make it an absolute contract for three thousand tons. We now give you notice, according to the provisions of the contract, that we elect to make the contract one for three thousand
127 tons, deliverable as expressed in the contract. This, of course, gives you the right to withdraw the letter by which the company announced their inability to fulfill on their part, if you elect so to do, and in that case, on your making up the deposit of the bonds to the amount required by the contract, we shall hold ourselves in readiness to proceed on our part. But it is manifest that in a matter of such magnitude you should act promptly, and unless, therefore, we shall, within a reasonable time, receive written notice from you that you will go on with the contract, and by that time you deposit with us the residue of the $100,000 Minnesota State bonds, we shall consider you as finally renouncing the contract, and act upon that footing.

We remain, dear sir, yours respectfully,

(Signed) T. B. CODDINGTON, & CO.

That the plaintiffs have ever been ready and willing, and offered to perform the said contract on their part in respect to the delivery of the first one thousand tons of iron therein mentioned, and have been ready and willing and offered to perform the same, as to
128 the remaining two thousand tons of iron therein mentioned; but the defendants have renounced the said contract, and wholly failed to perform the said contract, whereby the plaintiffs have sustained damages; that the market value of the said iron on the 1st July, 1858, and on the 1st January, 1860, was $44 75 per ton, and in the spring following $43 per ton.

Conclusions of law.

And I find, as conclusions of law, that the plaintiffs are entitled to
to recover as their damages aforesaid, the difference between the
contract price of the said iron and the market value thereof, as aforesaid, as the dates last aforesaid, to wit: the aggregate amount of
$47,500 with interest on $15,250 from the said 1st day of July, 1859,
on $15,250 from the said 1st day of January, 1860, and on $17,000
from the said first day of April, 1860, amounting in the whole to
$50,481 94; and that the said forty-five Minnesota State bonds be
sold under the direction of a referee to be appointed by this court;
that the plaintiffs may bid for and purchase the same or any part
thereof at such sale on their own account, and that the pro-
129 ceeds thereof shall be applied first to the payment of the
charges and expenses of said referee on said sale, and the
costs of this action, and the residue thereof to the payment of the
amount hereby adjudged to the plaintiffs for their damages aforesaid,
so far as the said residue will go, and that the plaintiffs, in case of a
deficiency therein, shall be entitled to judgment for such deficiency.

All which is respectfully submitted.

New York, October 26th, 1860.

THOS. H. RODMAN, *Referee.*

N. Y. Supreme Court.

THOMAS B. CODDINGTON, ors,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY.
} In Special Term,

Nov. 3, 1860.

Before Hon. W. H. Leonard, jr.

On reading and filing notice of application for the appointment of
a referee to make the sale directed to be made by the report of
130 Thomas H. Rodman, the referee to whom the issues herein
were referred for trial, with admission of service of such
notice by the defendants attorneys, Barbour, Lee & Smidt, esqs.,
on motion of S. P. Nash, for the plaintiffs, no one appearing to oppose; it is ordered that Thomas H. Rodman, esq., counselor-at-law,
be, and he is hereby, appointed the referee to make such sale, according to the rules and practice of the Court.

In Supreme Court.

Judgement.

THOMAS B. CODDINGTON, EDWARD S. SHERMAN, George L. Nichols, and Henry Nash,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY.

Nov. 6, 1860.

This action being at issue, and having been duly referred to Thomas H. Rodman, esquire, to hear, try, and determine the issues therein, and the report of the said Thomas A. Rodman having been filed, whereby he finds to be due to the plaintiffs from the defend-
131 ants the sum of $50,481 84, and reports that the plaintiffs
are entitled to judgment for that sum with costs, and that the forty-five Minnesota State bonds in the complaint herein mentioned be sold under the direction of a referee, to be appointed by this court, and that the plaintiffs may bid for and purchase the same or any part thereof at such sale on their own account, and that the proceeds thereof be applied, first to the payment of the charges and expenses of said referee on said sale, and the costs of this action, and the residue thereof to the payment of said sum of $50,481 94, adjudged to be due to the plaintiffs as damages, so far as said residue will go, and that the plaintiffs, in case of a deficiency therein, shall be entitled to judgment for such deficiency.

Now, on motion of Spier & Nash, esquires, attorneys of the plaintiffs, it is hereby ordered and adjudged that the plaintiffs recover against the defendants the sum of $50,481 94, together with $386 56 costs and disbursements in this action, amounting in all to the sum of $50,868 48; and that the forty-five Minnesota State bonds
132 described in said complaint be sold according to the rules and
practice of the court, under the direction of Thomas H. Rodman, esquire, who has been appointed by this court as referree to make such sale, that plaintiffs may bid for and purchase the same, or any part thereof, at such sale on their own account; and that the proceeds thereof shall be applied first to the payment of the charges and expenses of said referee on said sale and the costs of this action, and the residue thereof to the payment of the said sum of $50,481 92, with interest from the date of said report, so far as said residue will go; that the said referree make make a report of such sale, and file it with the clerk of this court; and that if the proceeds of such sale be insufficient to pay the amount so reported due the plaintiffs, with interest and costs aforesaid, the said referree specify the amount of such deficiency in his report of sale, and that the defendants pay the same to the plaintiffs.

Endorsed: Filed November 7, 1860, at 10h. 15 m.

133 N. York Supreme Court.

THOMAS B. CODDINGTON, & ors,
agst.
THE MINNESOTA & PACIFIC RAILROAD COMPANY.

To the Supreme Court:

In pursuance and by virtue of an order of this court made in the above-entitled action, on the third day of November, one thousand eight hundred and sixty, I, the subscriber, the referee named in the said order, do respectfully report, that I advertised the forty-five Minnesota State bonds in the judgment herein described, to be sold under my direction at the Merchant's Exchange, in the city of New York, on the 1st day of December, 1860; that previous to said sale I caused notice thereof to be published daily for three successive weeks, immediately prior to said sale, in the New York Herald, the New York Times, and the New York Tribune, daily newspapers printed in the said city of New York.

And I do further report, that on said first day of December, 134 1860, I attended at said Merchant's Exchange, and caused said bonds to be exposed for sale at public auction to the highest bidders, and that said bonds were then and there struck off to the following named persons, in the parcels respectively specified, to wit: to J. Bernheimer, 5 bonds, at $290 each, $1,450; to R. A. Douglas, 5 bonds, at $290 each, $1,450; to T. B. Coddington 35 bonds, at $290 each, $10,150, they being the highest bidders therefor, and those being the highest sum bid for the same. And I certify and report that said R. A. Douglas did, on the 14th day of December, 1860, assign his said bid and purchase to said T. B. Coddington, and that I did on the same day accept of the substitution of said Coddington as purchaser of five of said bonds in the place of said Douglas.

And I further report, that I have delivered said bonds to the respective purchasers thereof, and have paid over or disposed of the purchase money thereof, as follows: I have paid to Spier & Nash, esquires, the attorneys for the plaintiffs herein, the sum of 135 $386 56, being the amount of their costs in this suit, as taxed. I have retained in my hands the sum of $267 58, being the amount of my fees, commissions, and disbursements on said sale, as appears by reference to the statement hereunto annexed; and I have paid to Spier & Nash, esquires, attorneys of the plaintiffs, the sum of $12,395 86, and that there remains a deficiency upon the amount heretofore reported due in this cause, in favor of the plaintiffs against the defendants, of $38,086 06.

All of which is respectfully submitted.

Dated New York, Dec. 16, 1860.

THOS. H. RODMAN, *Referee.*

Statement of referee.

		Cr.
Paid advertising sale for 3 weeks—		
In Tribune	$18 00	
In Times	18 00	
In Herald	22 25	
P. C. Buckley, auctioneer	64 33	
		122 58
Fees, commissions, &c., of referee		145 00
		$267 58
Amount heretofore reported due		50,481 94
ealized from sale to be applied		12,395 86
136 Deficiency		$38,086 08

THOMAS H. RODMAN, *Referee.*

Endorsed: Filed Dec. 4, 1861.

N. Y. Supreme Court.

THOMAS B. CODDINGTON, EDWARD S. SHERMAN, George L. Nichols and Henry Nash,
agst.
THE MINNESOTA & PACIFIC RAILROAD COMPANY.

SIR: You are hereby notified to docket judgment in the above-entitled suit against the defendant for a deficiency of $38,086 06, according to the report of sale by the referee herein filed, December 4th, 1861.

N. Y., Dec. 18, 1861.

SPIER & NASH, *Pl'ffs Att'ys.*

To JNO. CLANCY, esq., clerk of Supreme Court.

137 Endorsed: Filed December 18th, 1861, at 12 h. 35.

All which we have caused by these presents to be exemplified, and the seal of our said Supreme Court to be hereto affixed.

Witness George G. Barnard, justice, at the city of New York, the 2nd day of November, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the ninetieth.

WM. C. CONNER, *Clerk.*

I, George G. Barnard, presiding justice of the Supreme Court of the State of New York, do hereby certify that Wm. C. Conner, whose name is subscribed to the preceeding exemplification, is the clerk of the said county of New York, and clerk of said Supreme Court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify the seal affixed to the exemplification is the seal of our said Supreme court, and that the attestation thereof is in due form.

138 Dated New York, November 2nd, 1865.

GEORGE G. BARNARD, *Justice.*

139

140

141 Supreme Court of the United States.

Edwin A. C. Hatch
vs.
Thomas B. Coddington,
impleaded, &c.

Know all men by these presents that we, Thomas B. Coddington, Peter Naylor and Benjamin Haxtern, all of the city of New York, are held and firmly bound unto Edwin A. C. Hatch in the sum of forty-five thousand dollars to be paid to the said Edwin A. C. Hatch, his executors or administrators, to which paymant, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 23rd day of October, A. D. one thousand eight hundred and sixty-seven.

Whereas the above-named Thomas B. Coddington hath prosecuted writ or error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the Circuit Court of the United States for the southern dist. of New York: 142

Now, therefore, the condition of this obligation is such, that if the above-named Thomas B. Coddington shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] T. B. CODDINGTON.
[SEAL.] PETER NAYLOR.
[SEAL.] B. HAXTERN.

Sealed and delivered in presence of—
W. D. Jones.

Southern Dist. of New York, *ss.*

Peter Naylor, being duly sworn, deposes and says, that he is one of the subscribers to the foregoing bond, and that he is a resident and freeholder within the southern district of New York, and is worth the sum of ninety thousand dollars over all his debts and liabilities, exclusive of property exempt by law from execution.

PETER NAYLOR.

Sworn to before me Oct., 1867.

W. D. JONES.
Notary Public N. Y. Co.

143 SOUTHERN DISTRICT OF NEW YORK, *ss.*

Benjamin Haxtern, being duly sworn, deposes and says, that he is one of the subscribers to the foregoing bond, and that he is a resident and freeholder of the southern district of New York, and is worth the sum of ninety thousand dollars over and above all his debts and liabilities, exclusive of property exempt by law from execution.

B. HAXTERN.

Sworn to before me Oct. 23, 1867.

W. D. JONES,
Notary Public N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

On this 23rd day of October, 1867, before me, personally came Thomas B. Coddington, Peter Naylor, and Benjamin Haxtern, all of the city of New York, known to me to be the same persons described in and who executed the foregoing bond, and acknowledged to me that they executed the same for the uses and purposes therein mentioned.

W. D. JONES,
Notary Pnblic N. Y. Co.

144 Endorsed: Supreme Court of the United States. Thomas B. Coddington, impleaded &c., plff. in error, *v.* Edwin A. C. Hatch, deft. in error. Bond on writ of error, Owen, Nash & Gray, att'ys for pl'ff in error.

The within bond approved Oct. 26th, '67.

SAM'L. BLATCHFORD,
Dist. Judge U. S., S. D. of N. Y.

145 UNITED STATES OF AMERICA, *ss:*

To EDWIN A. C. HATCH, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the southern district of New York, wherein Thomas B. Coddington impleaded, &c., is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 26th day of October, in the year of our Lord, one thousand eight hundred and sixty-seven.

[L. S.] SAM'L BLATCHFORD,
District Judge of the United States for the
Southern District of New York.

146 Endorsed: Supreme Court of the United States. Thomas B. Coddington, impleaded, &c., pl'ff in error, *a'gst* Edwin A.

C. Hatch, def't in error. Citation. Owen, Nash & Gray, att'ys for pl'ff in error. I admit due service of a copy of the within citation. Dated Oct. 28th, 1867. E. H. Hawke, per Jno. L. Provost. Filed Oct. 28, 1867.

147 Supreme Court of the United States.

THOMAS B. CODDINGTON, impleaded, &c.,
vs.
EDWIN A. C. HATCH.
} In error.

Of December term in the year of our Lord one thousand eight hundred and sixty-seven.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the capital in the city of Washington, comes the said Thomas B. Coddington, by Owen, Nash & Gray, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Edwin A. C. Hatch to have or maintain his aforesaid action thereof against the said Thomas B. Coddington; there is also error in this, to wit: that by the record aforesaid, it appears that the judgment aforesaid given, was given for the said Edwin A. C. Hatch against the said Thomas B. Coddington, whereas, by the law of the land, the said judgment ought to have been given for the said Thomas B. Coddington against the said Edwin A. C. Hatch; and the said Thomas B. Coddington prays
148 that the judgment aforesaid may be reversed, annulled, and
altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

OWEN, NASH & GRAY,
Att'ys for Plaintiff in Error.

Endorsed: 295. Supreme Court of the United States. Thomas B. Coddington, impleaded, &c., *vs.* Edwin A. C. Hatch. Assignment of general errors. Owen, Nash & Gray, att'ys for pl't'ff in error. Filed Dec'r 18th, 1867.

149 Supreme Court of the United States.

EDWIN A. C. HATCH
ads.
THOMAS B. CODDINGTON.
} In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and sixty-seven, the said Edwin A. C. Hatch, by Edward H. Hawke, his attorney, freely comes here into court and says, that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD H. HAWKE,
Attorney for Defendant in Error.

Endorsed: No. 295. Supreme Court of the United States. Edwin A. C. Hatch *ats.* Thomas B. Coddington. Joinder in error. Gentlemen: Take notice that the within is a copy of joinder in error on file with the clerk of the court. Yours, &c., E. H. Hawke, att'y for d'f't in error. To Messrs. Owen, Nash & Gray, att'ys for p'l'f in error. Edward H. Hawke, att'y for d'f't in error. Filed Dec'r 24th, 1867.

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Evening Post Steam Presses, cor. Nassau and Liberty Sts., N. Y.

Supreme Court

OF THE UNITED STATES.

Thomas B. Coddington,
Plaintiff in Error,

vs.

Edwin A. C. Hatch,
Defendant in Error.

This is a writ of error to the Circuit Court for the Southern District of New York. The plaintiff in error was the defendant below. The action was trover brought to recover for the alleged conversion of forty-five bonds of the State of Minnesota, which had been issued by said State to the order of The Minnesota and Pacific Railroad Company, and by said Company endorsed to bearer. (*Fol.* 3.)

The plaintiff made title to the bonds by a paper purporting to be an assignment from said Company to Selah Chamberlain, bearing date May 13th, 1859, but for which no authority from the Company was shown, and by assignment from Chamberlain to plaintiff. (*Fols.* 12, 13.) The bonds were described in both papers as bonds "in the hands of T. B. Coddington & Co.," a firm of which the defendant below was the senior member.

The only evidence of conversion was a demand made on the 30th October, 1860; defendant's refusal was "because the Referee had decided in his favor in suit against the Company, and directed the bonds to be sold." (*Fol.* 13.)

The defendant proved that the bonds were lodged with his firm in New York, prior to the alleged assignment of them to Chamberlain, to wit, on the 21st April, 1859, under an agreement of that date, a copy of which is set out at *fols.* 18, 23, made between the said Minnesota and Pacific Railroad Company by Edmund Rice, its president, and the said firm of T. B. Coddington & Co.

This was an agreement for the purchase by the Railroad Company of one thousand tons of iron of the said T. B. Coddington & Co., who were also to advance to the Railroad Company sixteen thousand dollars in money upon its notes, at six months. The Railroad Company was to deposit eighty-five bonds of the character of those in question "as a security for said loan and for the performance of this contract by said Company." (*Fol.* 18.) The forty-five bonds in question were at the time in New York, and were delivered upon the execution of the agreement, Rice, the president of the Company, undertaking to send forty more to make up the eighty-five, without delay. (*Fols.* 23–4.)

This agreement was negotiated in the city of New York by Rice, the president of the Railroad Co., through Wm. H. Newton, a director, who was acting with Rice, and under his direction, and upon the exchange of the papers Rice and Newton both returned to St. Paul, the headquarters of the Company.

Shortly after his arrival at St. Paul, to wit, April 30th, 1859, Rice, the president, wrote to T. B. Coddington & Co.: "I found upon my arrival here that the acting president of this company had disposed of the forty Minnesota State bonds, which were to have been forwarded to you by the terms of the contract made between us in New York. You will perceive therefore, that it is impossible for the company, at the present time, to comply with its undertaking. Some action of the board of directors will be had upon the subject, which I shall take pleasure in advising you of at the earliest moment." (*Fol.* 46.)

Rice, who was witness for plaintiff below, also testified, that immediately on his arrival at St. Paul, he learned from R. R. Nelson, (vice-president of the company, and in Rice's absence acting president, *fol.* 82,) that he had disposed of the forty bonds and that thereupon, the letter of 30th April, was written (*fol.* 60);that he, Rice, "talked with the directors as he met them, about this contract" and that it was referred to at the meeting of the board of the 29th April (*fol.* 73.)

Hatch, the plaintiff below, was one of the directors of the R. R. Co. He testified, he knew of the contract made in New York about the time Newton and Rice returned, and that it was "talked over informally at the first meeting of the board after they returned." (*Fol.* 80.) He had himself, in the February or March previous, (*fol.* 83), been sent down by Nelson to Rice at New York, with the whole issue of 100 bonds as received from the State, to raise money on, and had sold fifteen of them, returning eighty-five to St. Paul, (*Rice, fol.* 65, *Hatch, fol.* 79.)

Several meetings of the board were held after the return of Rice and Newton to St. Paul before the 13th of May, the date of the alleged transfer under which plaintiff claims, at all of which Rice, Newton, Nelson and Hatch were present, except that Nelson was absent from the one of May 6th. (*Fols.* 66 to 69.) At none of these meetings was any action taken *adversely* to this contract.

On this 13th of May, 1859, the Board passed the following resolution.

"Whereas circumstances have arisen in the affairs of this Company, whereby it has become impossible to comply with the terms of the contract made by the president thereof, on behalf of the company with T. B. Coddington & Co., of the City of New York, under date of April 22d, 1859, therefore:

Resolved; That Wm. H. Newton, Esq., be and he is hereby authorized to proceed to New York, and procure a surrender of said contract and a return of the forty-five Minnesota State bonds transferred to Messrs. Coddington & Co., upon such equitable terms as may be agreed upon."

A copy of this resolution, certified by the secretary under date of May 17th, as having been unanimously passed, (*fol.* 32,) was furnished to Newton, who repaired with it to New York, taking also a letter from Rice, the president, referring to the resolution and stating that Newton would be able "to explain the particulars of our inability to comply with the agreement," (*fols*. 76–7.) Nelson also furnished Newton with an order on Coddington & Co., dated May 14th, to deliver the said bonds, describing them as "bonds belonging to the Railroad Co.," notwithstanding the alleged transfer of them on the 13th, to Chamberlain.

The contract with T. B. Coddington & Co, had contemplated that the bonds lodged as collateral might be used in Great Britain in the purchase of iron: "and the said T. B. Coddington & Co., are hereby authorized to negotiate and make sales of said bonds, or to use the same for the purchase of iron, and are to account to said Company for said bonds, or the cash proceeds of any of them sold" &c. (*Fol.* 18.) It looked to the supply of a large quantity of the iron that the Company would need for the construction of its road, and the sellers had the option of increasing the amount to be furnished under it from one thousand to three thousand tons, each thousand tons calling for an additional deposit of bonds, not to exceed seventy "by way of security * * * * * and with like power to sell and dispose of the same." (*Fol.* 22.)

The contract also provided, that Newton should proceed to Great Britain, there "to aid on the part of said Company in the negotiation of the said bonds," (*fol.* 22) Hatch and Rice having been unable to get more than 60 per cent. for them in this country. (*Fols.* 64, 65, 79, 83.)

When Newton arrived in New York with the resolution of May 13th, authorizing him to procure a surrender of the contract, he found that Coddington & Co. had already sent the forty five bonds to Great Britain, to a member of the firm who was there. Plaintiff below introduced Newton's letter to the Company, dated May 21st, advising of that fact. (*Fol.* 30,) The bonds had been taken over by George L. Nichols, a member of the firm, who sailed April 27th, just after the execution of the contract, and before anything had been heard from the Company. (*Fols.* 54–5.) But he was early advised that the Company refused to go on with the contract, and the bonds were brought back. (*Fol.* 55.)

Newton's negotiations for a surrender of the contract came to nothing, and were taken up by Rice, who came to New York in September or October, 1859. (*Fols.* 74–5.) Coddington proposed to refer the matter (*fols.* 75, 86) claiming damages according to the difference between the contract price and the market price of the iron; Rice, as he testified, claiming that the contract had been made conditionally. (*Fols.* 74–5.) His negotiations were fruitless, and Coddington & Co. brought a suit in the Supreme Court of the State against the Railroad Company, serving the process on Rice. (*Rice, fol.* 75.)

The record in that case is at pages 41 to 55. It was was offered in evidence by the defendant as an estoppel conclusive of the questions involved in this action. The Court held it no estoppel, but admitted it as a circumstance " to be submitted to the jury, to which ruling and decision defendant's counsel duly excepted." (*Fol.* 45.)

In the action in the State Court the plaintiffs counted on the contract, alleged the breach of it by the Railroad Company, and the damages sustained, and asked the equitable relief that the bonds lodged as collateral might be sold by order of the Court, and the proceeds applied to the payment of such damages as should be awarded. The Company appeared by attorneys and answered, the answer being verified by one of the directors, under date of January 6th, 1860. (*Fol.* 116.) The issues were by consent referred to a Referee (*fol.* 117), who made a full report, dated October 26th, 1860 (*Fols.* 118–129.) It was not till after this report that notice was given of the claim of Hatch, plaintiff below, on the 30th of October, and demand made by a clerk in the office of the defendants' attorneys in that action, for a delivery of the bonds to John M. Barbour, who was one of said attorneys. (*Fols.* 12, 13. 50.) Defendant refused to deliver them because the Referee had decided in his favor. (*Fols.* 13, 14.)

In that action the Railroad Company pleaded various defences: That the contract was never made by its authority, nor in any way ratified; that Rice had acted without authority; that the bonds had been delivered to Newton for a special purpose; that the contract was a cover for usury; that the plaintiffs had suffered no damage, &c.; but there was no suggestion of any interest of Hatch in the bonds. Hatch was also, during the pendency of the action, examined by the Company, on commission, as a witness (*fol.* 46), as well as Newton (*Fol.* 31.)

The report of the Referee was made a judgment of the Court, and the bonds ordered to be sold towards satisfying the damages awarded to the plaintiffs in the action, which were assessed at $50,481 94. (*fols.* 131-2).

They were duly sold under this judgment at about 29 per cent., on the 1st December, 1860, thirty-five of them being bought by defendant below, the other ten by others (*fols.* 52-3, 134).

The present action by plaintiff below was brought about five years afterwards, November, 1865 (*fol.* 2.) Under the rulings and charge of the Judge it resulted in a verdict against the defendant below as for a conversion of the bonds, the jury assessing their value at sixty per cent., and awarding interest from 7th May, 1859 (*fols.* 7, 8, 99), in all $42,970 50.

The bill of exceptions of defendant below is at pages 4 to 41.

On the trial the Court held that the authority of Rice to make the contract depended on the language of certain resolutions of the Company, passed 13th July, 1858, which had been furnished to Coddington & Co. during the negotiations prior to the contract, and that these resolutions did not authorize it; allowed Rice to testify to private conversations between him and his colleague Newton, limiting the powers of the latter, although not brought home to Coddington & Co.; admitted parol evidence of conversations between Newton and his co-directors at St. Paul, to impair the force of the resolution of May 13, as a recognition of the obligation of the contract, and treated Newton, who was a director of the railroad company, and its special agent, as though he had been the agent of Coddington & Co., charging the defendant below with the constructive knowledge of all his acts, and receiving in evidence his statements and declarations.

The special exceptions are stated in connection with the several points.

The only ground of jurisdiction over the case must be that the parties were citizens of different States. The record does not show this ground of jurisdiction, there being nothing in it on this subject by way of allegation or averment, but merely a description in the title of the declaration of plaintiff, as "a citizen of the State of Minnesota" (page 2, *fol.* 1), and nothing anywhere as to the citizenship of any of the defendants.

POINTS.

I.—The documentary evidence furnished by Rice to Coddington & Co. of his authority to make the contract, justified them in believing that he had such authority.

The charge to the jury was explicit that "Rice had no authority" (*fols.* 95-6). The exception is at *fol.* 99.

Rice testified that he handed Newton, to furnish to Coddington & Co., a copy of the resolutions of July 13, 1858, "to satisfy them what authority, what confidence, the company had reposed in me" (*fol.* 59), and also a copy of the loan bill under which the bonds were issued (*fol.* 65).

This loan bill authorized the issue to the railroad company of State bonds, "for the purpose of expediting the construction" of the road (*fol.* 39), made them "transferable by the endorsement of the president" (*fol.* 42), and required as security for the payment of them by the Company, and of the interest accruing on them, the deposit of a corresponding amount of the first mortgage bonds of the company (*fol.* 43). It became operative as a law, the 5th of May, 1858 (*fol.* 25), and the Companies availing themselves of its provisions were to notify the governor of the State, and within sixty days commence operations, and within two years have fifty miles of road ready for superstructure (*fol.* 42). The bonds were to be issued in amounts of $100,000 for every ten miles of road ready for rails, and another $100,000 for every ten miles fully completed (*fols.* 40, 41).

The bonds were to be used to enable the Company to build its road, and might therefore properly be used in the borrowing of money, in the purchase of rails, or in the payment for construction. On the 13th July, 1858, after the loan bill had become a law, the Board of Directors passed a resolution, which after reciting that the interest of the Company required "that no default in the performance of the conditions under which the credit of the State of Minnesota *has been loaned to this Company* shall occur, and that means shall be promptly provided *with the aid of said loan of State credit*, to construct one hundred miles of road at an early day," (*fol.* 62) proceeded to empower Rice, the president. (1) to dispose of the first mortgage bonds of the Company, (2) to borrow money (3) to purchase iron, (*fols.* 62–3.)

The Court below told the jury that this resolution related *wholly* "to the negotiation of the first mortgage bonds and to the appropriations of the avails of them."

(*Fol.* 96.) This was clearly erroneous. The power to borrow money was an independent power. The President was not to borrow money with the avails of the mortgage bonds, nor was he so limited in his power to purchase iron. He was first given the right to sell, loan or pledge the mortgage bonds of the Company; if he succeeded, he would of course get money either by sale or by mortgage or pledge of the bonds. Then came the power to borrow money, as a distinct power, not on the mortgage bonds, as that was previously given, nor with the money already borrowed on them, which would be an absurdity, but clearly on any security the Company might furnish him with. But if this general power to borrow money cannot be restricted to borrowing by use of the mortgage bonds, still less can the power to buy rails, locomotives, cars, &c., which is also a distinct power, as it is in the order of enumeration separated from the power to dispose of the mortgage bonds, by the power to borrow money.

The notion that, because this distinct issue of 100 bonds was not in existence at the time the resolution of July 13th, was passed, they cannot be considered as embraced in it, has little force. It was not shown that this was the first issue of State bonds to the Company. The law authorizing them had been adopted April 15th, three months before (*fol.* 25) and all the Companies, doubtless, were ready to draw their bonds by getting ten miles of road graded. The language of the resolution reciting that the credit of the State has been loaned to this company" (*fol.* 62) if it does not show that bonds had already been received, certainly shows they were expected.

The bonds were transferable by endorsement of the president, he did endorse them, and assumed to deliver them with authority. "I hand you by Mr. Wm. H. Newton forty-five thousand dollars of Minnesota State bonds." (*Fol.* 23.) He furnished a copy of the loan bill and of the resolution in question as evidencing his authority. He does not appear to have had any mortgage bonds with him though he had come East to buy iron. (*fol.* 65.) The Company which sent him and furnished him with powers to borrow money and buy iron and rolling stock, together with the apparent control of negotiable State bonds made for these very purposes should not be allowed to plead that the powers it gave were vague or ambiguous. They could by a few words have easily limited them to disposing of the proceeds of the mortgage bonds, but with such a limitation it is quite clear his visit to the East would have been useless. As against the Company the power should be construed as any one dealing with the president, might under the circumstances, fairly understand it, and as authorizing the usual means of executing it.

See *Le Roy* v. *Beard*, 8 *How.*, 451, 468; *Sandford* v. *Handy*, 23 *Wend.*, 260; *Nelson* v. *Cowing*, 6 *Hill*, 336.

If the Court erred in the instruction to the jury on this point, the judgment should be reversed, as, it is not certain that the jury would have found that the contracts were exchanged provisionally; nor if the resolution did in fact give the president power to make the contract and lodge the bonds, could Nelson, the vice president, curtail this power by the special authority in reference to them now to be considered.

II.—Hatch, the plaintiff below, had come to New York in February or March, 1859, to dispose of the bonds, and then Rice endorsed them (*fol.* 65.) Hatch returned to Minnesota with eighty-five of them, leaving Rice, the president, at the East, trying to buy iron (*fol.* 65.) Hatch having failed to dispose of the bonds satisfactorily, Nelson, the vice president, sent Newton, and gave him a paper dated March 18th, 1849, authorizing him to borrow on the forty-five bonds $16,000 in money, and pay the interest coupons upon the first mortgage bonds of the Company due in New York City, April 1st, and signed it as "acting president" (*fol.* 27.) To the receipt of this paper in evidence, defendant below objected on the ground that he had no notice of it. The objection was overruled, and exception taken (*fol.* 27.)

At the close of the case defendant's counsel requested the Court to charge that the contract was properly executed, and if there were any private instructions to Rice or Newton, not communicated to defendant, they did not impair the authority of Rice in respect to the defendants (*fol.* 87.) The Court refused so to charge and defendant excepted (*fol.* 98.) This was error.

(1.)—The power of Rice was earliest in time, was a formal resolution of the Board of Directors, and was therefore superior in authority. The president himself could not, as president, by his individual act have revoked or curtailed such a power given by resolution of the Board to any subordinate, much less could the vice president, his substitute, in his absence, revoke or curtail such a power conferred on the president himself.

(2.)—No action of the Board was shown giving the vice president any power at all. He may have had the right to dispose of these bonds, and to authorize Newton to dispose of them as he had previously authorized Hatch; but the letter to Newton and his receipt (*fols.* 27, 8), were rather precautions to ensure Newton's fidelity on being entrusted with securities which, having then been endorsed, were negotiable by delivery, than acts affecting Rice's powers; Newton had taken the bonds to Rice at Philadelphia (*fol.* 56) and had probably failed in raising money on them as the coupons due on the 1st April were past due over twenty days when the contract in question was executed.

> (3.)—But if the Board had passed formal resolutions revoking Rice's authority they would not have been available to impair that authority as it respects third persons acting upon the faith of the power originally given, without notice of any revocation. *Story on Ag.* §470; *Lightbody* vs. *N. Am. Ins. Co.*, 23 *Wend.*, 18.

The error of the Court below was in treating the contract as having been made with Nelson. If that had been the fact, the defendant might have been bound to call for his authority. But the contract was made with the head of the company: "The said Minnesota & Pacific Railroad Company, by their *president* duly authorized by resolution of the Board of Directors of said company," (*fol.* 23.) Newton's co-operation even was not necessary to the validity of the president's act, and the error therefore of admitting evidence of the authority under which Newton brought down the bonds as impairing in any degree Rice's authority without even showing that defendant knew Newton had brought them down, seems palpable.

> There was no evidence whatever that defendant below had notice of any fact restricting the apparent scope of the powers conferred on Rice by the resolution of the Board, and the control of the bonds. Rice testified that he didn't see the defendant before he returned home with the contract. (*Fol.* 58.)

III.—The Court below erred in receiving improper evidence to show that the agreement between the Railroad Company and Coddington & Co. was delivered conditionally, and in submitting such evidence to the jury.

The contract was in duplicate, both parts executed and then exchanged, Rice taking with him to Minnesota (*fols.* 65, 66, 73, 77,) the Company's contract, and Douglass, a clerk of Coddington & Co., taking the other. (*Fols.* 17, 23.) *Nothing was said at the time of delivery qualifying the effect of the exchange of the papers.* Newton said there was not. (*Fols.* 31, 47.) Rice did not say there was, but testified: "Can't state what passed at the time of the execution of the papers." (*Fol.* 74.) Douglass, the only other person present, was dead at the time of the trial. (*Fol.* 55.) The agreement was absolute on the part of the Company to buy, and on the part of Coddington & Co. to sell one thousand tons of iron, and equally absolute on the part of the Company to deposit forthwith eighty-five bonds with Coddington & Co. (*Fol.* 18.) It is true that at the time only forty-five of them were in New York, but the inference which might otherwise have been drawn from that fact, that until the rest were sent on the contract was not to take effect, was excluded by a separate paper in which Rice stated that he deposited these forty-five in part performance of the agreement, and would send on the rest without delay. In this paper should have been mentioned every qualification. What was conditional about the arrangement was expressly confined to the obligation of Coddington & Co. to make the cash advance of $16,000, which he was not obliged to make till he got all the bonds. (*Fols.* 23–4.) This paper was executed with the agreement (*fols.* 23, 31,) and taken away by the clerk, who also left with Rice Coddington & Co.'s letter of credit for $16,000, (*fols.* 54–5,) which Rice retained until after Newton was appointed special agent to effect a surrender of the contract, when he sent it with the contract by him to New York. (*Fol.* 78.)

The whole arrangement, therefore, was in writing, and nothing took place when the papers were exchanged to qualify the delivery.

But the Court admitted evidence of what had passed between Rice and Newton "pending the negotiations" (*fols.* 57, 58–9,) against the objection that it was parol evidence, and that defendants were not present, and refused a request to charge that all oral testimony that the delivery was conditional should be disregarded (*fols.* 88, 98-9,) and left to the jury the question, whether the delivery was conditional upon the contradictory testimony of Rice and Newton. (*Fols.* 93-4.)

(1.) An exchange of papers is *prima facie* an absolute delivery.

(2.) Though a delivery may, as an act *in pais*, be shown by parol evidence to have been qualified or conditional, the evidence must be confined to what took place at the time of the delivery. (*The Phil., &c., R. R.* v. *Howard*, 13 *How.*, 307, 334.)

(3.) Where, as here, a writing is signed, showing to what extent, notwithstanding an exchange of papers, any matter is left open, parol evidence showing any further qualification is inadmissible.

(4.) The conversations between Rice and Newton were conversations between two agents of the same principal, and were inadmissible as against Coddington & Co.

(5.) The delivery of the bonds was effected by the delivery to Douglass, the clerk of Coddington & Co., of the agreement and letter. (*Fol.* 23.)

The bonds were in the safe of Coddington & Co., and no manual delivery was therefore necessary. Newton's formal delivery, therefore, in pursuance of the agreement already executed and delivered (*fol.* 26,) in no sense made him a special agent for their delivery. But if he was such agent, there was no evidence that he in any way qualified the formal delivery by anything then said.

IV.—There was not a particle of evidence to justify the Court in treating Newton as in any way the agent of Coddington & Co., admitting against them his declarations and charging them with notice of all his acts.

Newton was a director of the Railroad Company, and had been in the first instance sent down as a special agent of the Company to borrow money on the bonds (*fol.* 27), but he had put himself in communication with Rice, the president, who was at the east trying to buy iron (*fol.* 65), had come with him to New York and opened negotiations for the purchase of iron with Coddington & Co.

In these negotiations he acted not as agent of the Company, but as Rice's messenger, Rice being sick (*fol.* 56). Rice testified: "I directed Newton" (*fol.* 57); "I handed him a certified copy of the resolution, &c., * * * * to show Coddington, or deliver to him, to satisfy Coddington & Co. what authority, what confidence the Company had reposed in me." (*Fol.* 59.) "The paper shown me is a certified copy of the loan bill which authorized the issue of State bonds to our Company and this I furnished to Mr. Coddington. This was furnished *me* by the Company, and I brought it with *me* with the resolution furnished at the same time. Newton passed between *me* and Coddington. Saw him almost daily." (*Fol.* 65.) The evidence furnished by Rice was all of his authority, not Newton's. Newton simply brought to Rice the proposals. "The terms of that negotiation were submitted to me by Newton as it progressed from time to time," (*Fol.* 65.) Newton testified: "I was not acting for Coddington" (*Fol.* 31.), and there was no evidence to the contrary. The fact that he had "known Coddington a long while and had had business transactions with him" (*Fol* 28), that he had been a joint owner with him "in real property purchased some time before," and was "interested with him in a knitting-machine company" (*Fol.* 49), made him in no sense an agent of Coddington & Co. in this transaction. Such evidence was only admissible as affecting the weight of Newton's testimony in matters where he was contradicted.

V.—The acts of the Board after being informed of the contract were a clear recognition of it as obligatory on the Company.

(1.) Rice's letter of April 30th, did not hint that the contract was repudiated, but only stated that it was "impossible for the Company at the present time to comply with *its* undertaking." (*Fol.* 46.)

(2.) At none of the seven meetings prior to May 13th, was any action taken to rescind it or to notify Coddington & Co. that it would not be carried out. *Fols.* 66, 69.)

(3.) The resolution of May 13th (*Fol.* 32), described the contract as having been "made by the president thereof on behalf of the Company," did not repudiate it but declared that it had become impossible "to comply with the terms of it," and authorized Newton to "procure its surrender," not as a matter of right, but "upon such equitable terms as may be agreed upon."

The Court refused to charge as requested that the acts of the Company were a recognition of the validity of the contract, charged that there was no confirmation, no approval in it, and defendants excepted. (*Fols.* 87, 96, 97, 99.)

VI.—The Court erred in permitting parol evidence of Newton's statements to explain the meaning of the resolution of May 13th, (*fols.* 34, 60,) in refusing to charge defendant's fourth request, (*fols.* 87, 98,) and in telling the jury that such parol evidence "explains the terms of the resolution." (*Fol.* 97.)

This resolution was the formal act of the board, certified by the secretary and trasmitted to Coddington & Co., for their guidance by the president. (*Fol.* 76.) To admit evidence of the discussions upon it as interpreting its meaning was in violation of the rule on that subject. (*Gould v. Norfolk Lead Co.*, 9 *Cush.*, 338.)

Newton's statements made out of the board were on that ground also inadmissible. (*Fol.* 79.)

VII.—But if Newton's conversations while the resolutions were under discussion were admissible; his formal letter to the party with whom he was to negotiate, written as agent under the resolution, should not have been excluded. (*Fols.* 36, 38.)

(1.) The position taken by the agent under the resolution was the position of the Company on which the other party had a right to rely. Had the agent taken the ground that the contract was without authority, and had been delivered only subject to ratification, Coddington & Co. might have inquired further and possibly have surrendered it without controversy. But the letter conceding the obligation of the contract, did not demand a surrender, but made the question simply one of equitable terms. If Coddington & Co. had no rights under the contract, any terms they imposed would have been illegal; but if the contract was valid their terms might be inequitable, but not illegal—

would not make them liable in trover as for a conversion.

(2.) The evidence was competent as bearing on the question of fact left to the jury upon the conflicting evidence of Rice and Newton, whether there was in truth any understanding between them that the contract was to be conditionally executed.

In sending Newton to negotiate for the surrender of the contract and bonds, the Company had furnished Newton with a certified copy of the resolution. Rice had also enclosed it in a letter to Coddington & Co., in which he said, Newton "will be able to explain the particulars of our inability to comply with the agreement," and hinting that the contract might yet in some way be carried out through Chamberlain. (*Fol.* 77.) The records show that the real reason that the Company did not go on with the contract, was that it had on the 13th May, put itself into Chamberlain's hands, who was thenceforth to receive all the State bonds. (*Fol.* 69, 73.) Newton's letter as special agent explained the particulars of this action of the Company and showed that there was never any question as to Rice's authority nor any suggestion that the contract had not been absolutely executed.

This, as contemporaneous written evidence, was of much better quality than the recollections of the witnesses at the trial years afterwards, and should have been left to the jury, if they were at all instructed to pass upon the question whether the contract was conditionally delivered.

The evidence was competent as the statement of an agent, in the transaction of the business of his agency, *Cliquot's Champagne*, 3 *Wall.*, 114, 140.

[The date of May 17th, in this letter, (*fol.* 36) is an error. This was the date of the secretary's certificate authenticating the resolution. [See fol. 32, 76.]

VIII.—The testimony to show that no iron was delivered, or money paid under the contract, was improperly received, and the exception to it well taken. (*Fol.* 35.)

If the contract was valid between the parties, it imposed upon them reciprocal obligations, and no right to the possession of the bonds would enure' to the Railroad Company till these obligations were dissolved. A claim for damages, though merely nominal, would, so long as the contract remained in force, entitle the vendors to retain the bonds until a tender of some kind discharged their lien upon them. The Railroad Company held the contract and Coddington & Co's letter of credit for $16,000, until Rice sent them down by Newton. (*Fol.* 78.) Had the Company then tendered the residue of the bonds, it could have drawn for the $16,000 at once. (*Fols.* 23-4.) Had iron gone above the contract price, the company would have had a claim for substantial damages, if Coddington & Co. failed to deliver.

The evidence objected to was entirely apart from the case, but was pressed by the Court upon the jury as evidence of some great wrong in connection with an interpretation of the contract which perverted its entire meaning and effect. The Court told the jury it was a contract by Coddington & Co. to exchange for $85,000 in bonds, $16,000 in money and the residue in iron, and though neither iron or money was furnished, Coddington & Co. claimed to retain the bonds. But in fact the contract was to sell 1,000 tons of iron, which, at the contract price of $60 a ton, came to $60,000, and advance $16,000 in cash, total $76,000, receiving *as security* $85,000 of bonds then worth at the highest rate of 60 cents, $51,000, with power to use them in the purchase of the iron, in which case they were to be accounted for at the price obtained.

IX.—All the questions between the Railroad Company and Coddington & Co. were involved in the action brought in the Supreme Court of the State and the judgment in that action should have been held an estoppel.

The Court, on the defendants' offering it, held it no estoppel, but admitted it at plaintiff's instance "as a part of the history of the case * * * to be submitted to the jury," and defendant excepted. (*Fol.* 45.)

(1.) The judgment should have been held conclusive.

Both parties claimed under the Railroad Company as owning the bonds, on and prior to April 21st, 1859. On that day they were delivered to Coddington & Co., and whether their possession was lawful or unlawful, there was no one to whom they could safely return them except the Railroad Company.

Plaintiff dated his title from 13th May, 1859, but did not claim to have given any notice of it to Coddington & Co., till October 30th, 1860. (*Fols.* 12–13.)

On the same 13th May, the Railroad Co. passed the resolution appointing Newton special agent to get a return of the bonds. On the 14th May, Nelson gave an order on Coddington & Co., for the bonds, still describing them as "bonds belonging to the Railroad Co." (*Fol.* 85.) On the 17th May Rice wrote (*fol.* 76) vouching Newton's authority. Newton came to New York to get the bonds, and was followed by Rice in October, 1859, no one producing any authority from Hatch, or giving any notice of his title. At this time, Coddington & Co. commenced their action, serving process on Rice as president (*fol.* 78); the company appeared by attorneys, and answered; Steele, one of the directors, verifying its answer January 6th, 1860. (*Fol.* 116.) The issues were referred by consent of parties in June, 1860, (*fol.* 117) and the Referee reported against the Railroad Company, October 26, 1860, (*fol.* 129) and then, and not before, the claim of Hatch as assignee of the bonds, was brought forward. On the 6th Nov., 1860, the report was made a judgment of the Court. (*Fol.* 131.)

The complaint in that action, alleged the execution of the contract by the Railroad Company, and the deposit of the bonds as security, claimed that the Company had refused to go on with the contract, and that Coddington & Co., had suffered damages, prayed that they might have judgment therefor, and that the bonds might be sold to meet such damages.

The Railroad Company denied the validity of the contract in every respect, and raised every other point on which Hatch, the plaintiff below in this action, contested the rights of Coddington & Co. (*Fols.* 108–115).

The judgment was therefore conclusive as against the Railroad Company.

(2.) It should have been held conclusive as against Hatch, the plaintiff below. But the Court held the title of Hatch was not involved in that action. (*Fol.* 45).

Hatch having acquired his alleged title by assignment from the Railroad Company, took subject to all rights of Coddington & Co., as against the Company, until he gave them notice of his title, and till then, was in privity with the Railroad Company. *Robbins* v. *Chicago City*, 4 *Wall.*, 657.

Had the bonds been surrendered to Newton or to Rice on their demand, Hatch could not have held Coddington & Co. liable for such surrender.

Had Newton or Rice brought trover for the bonds in the name of the Railroad Company, in the summer or fall of 1859, and recovered judgment against Coddington & Co., such judgment would have protected them as against this claim of Hatch. If not, a payment of the judgment recovered by Hatch in the action now before the Court would be no protection against another claim under some secret assignment which possibly exists from Hatch to Rice, or Nelson, not yet brought to the notice of Coddington & Co.

But if a judgment in a suit brought by the Railroad Co. against Coddington & Co. would protect the defendants therein from a second action for the same bonds bought by Hatch, judgment would be equally efficacious if in their favor. A judgment operates as an estoppel, irrespective of the question which party succeeds in the suit.

Nor does it make any difference which party is actor. If a judgment in a suit brought *by* the Railroad Co. against Coddington & Co. would be conclusive that the defendants therein were entitled to the bonds, the result would be the same if the suit were brought *against* them.

This was said in *Dey* v. *Dox*, 9 *Wend.*, 129, 131, to rest "upon principles too well settled to require examination," though there the plaintiff in the second suit had suffered manifest wrong as defendant in the first.

Here, Coddington & Co were the depositaries of the bonds. On their theory they were pledgees, bailees with an interest entitling them to retain them, but they were at least naked bailees charged with the duty of taking ordinary care of the bonds and of giving them up, upon demand, to the parties from whom they received them, and to no one else till they had notice of some other claim.

While in their possession, and before any call made upon them to return them, the plaintiff claims they were transferred to him by the assignment of May 13th. At this time Coddington & Co. were in no default, they had received no direction about the bonds from the Company; the only advices they had being in Rice's letter of the 30th April, which left matters as they were till future action of the Board of Directors, (*fol* 46.)

They were therefore lawful and innocent depositaries.

The assignments under which Hatch claims described the bonds "as now in the hands of T. B. Coddington & Co. of the City of New York."

The sale, therefore, was of property in the possession of a third person, and it is well settled that such a sale, though as between the parties it passes the title, is no sale as to the depositary till full notice to him be given with evidence of the transfer, and as some of the cases say, till he attorns to or recognizes the title of the transferee. *Rich* v. *Aldred*, 6 *Mod.*, 216—*Tiernan* v. *Jackson*, 5 *Peters*, 580—*Bush* v. *Lyon*, 9 *Cowen*, 52—*Gardner* v. *Adams*, 12 *Wend.* 297—*Hall* v. *Robinson*, 2 *Comst.*, 293—*Tome* v. *Dubois*, 6 *Wallace*, 548.

It would seem then that there can be no answer to the position, that the judgment against the Railroad Company is conclusive against the plaintiff herein that defendants acquired a valid right to hold the bonds in question as security for their claims under the agreement of April 21st, 1859, and that that agreement was a valid contract between the parties. *Marsh* v. *Pier*, 4 *Rawle*, 273.

There can be no objection to the jurisdiction of the Conrt on the ground that the Railroad Company was a foreign corporation, and none was raised in the Court below.

Suits may be brought against such a corporation by a resident of New York in all cases, and by a plaintiff not a resident where the cause of action shall have arisen or the subject of the action shall be situated within the state. *Code of Proc.*, §427.

Suit may be commenced by summons served "within the State personally upon the president, treasurer or secretary thereof." Id., § 134. The defendants duly appeared by attorneys whose authority was not questioned.

There can be no doubt, therefore, of the complete jurisdiction of the Court, in which the judgment was rendered. *Dart* vs. *Farmers' Bank*, 27 *Barb.*, 337; *Cook* vs. *Champlain Transp. Co.*, 1 *Denio*, 91.

That the cause was tried by a Referee is no objection. Such references are expressly authorized by the Code of Procedure of N. Y. (§ 270), and are even sanctioned in the Federal Courts, as well established modes of procedure fully warranted by law. *Heckers* vs. *Fowler*, 2 *Wallace*, 123; *Alexandria Canal Co.* vs. *Swan*, 5 *How.*, 83.

It may be said that defendant below in the suit against the Railroad Company had notice of the plaintiff's title before judgment was entered in that suit. The demand for the bonds in the name of Hatch was made on the 30th October. Defendant answered as the ground of the refusal to give them up, that the Referee had decided in his favor. Judgment was perfected on this report on the 7th November following.

By the Code of Procedure, the report of a Referee stands "as the decision of the Court" and judgment is entered on it, of course, as soon as costs are taxed. § 272, 278.

The controversy then had passed *in rem judicatam* when plaintiff herein chose to give his notice. He knew of the suit all along; in fact, had testified as a witness in it. But if a party who is litigating in the name of another can lie by, concealing his own interest till the eve of an adverse judgment, the opposite party might be baffled in ever obtaining a decision of the controversy.

If he undertook to bring in as a party the person who had just given notice of his title, before the litigation could be ended as to him, a second assignee might bring forward a title acquired since the first assignee was made party defendant, and so on indefinitely.

Hatch might have applied to the Supreme Court to intervene in that suit, and if he could have shown that there was a defence which the Company had failed to interpose, might perhaps have had a new trial given him. But his own laches would probably have defeated such an application.

(3.) The misinterpretation of this record by the Court below was amazing. This point is open to the plaintiff in error under the ruling that the judgment was "proper to be submitted to the jury," because upon the ruling he was obliged either to withdraw the record by which he would have abandoned his offer of it, or to submit to the Judge's disposal of the offer, excepting to the manner of such disposal.

The Court first thought, and so told the jury, that the action in the State Court had operated a rescission of the contract which of itself gave the Railroad Company a right to recover back the bonds, or the *consideration* as they were called by the Judge. (*Fol.* 98.)

The bonds were not the *consideration* of the contract, but a security for the obligations of the Railroad Company. The action was brought to adjudicate the damages for an alleged breach of these obligations, and to enforce the security for them—to foreclose the pledge, or mortgage. It would seem strange to hold that a suit to foreclose a mortgage would be a rescission of the contract which would entitle the mortgagor to bring ejectment for his land.

That the action in the State Court was a proper one is quite clear. If the contract was executed so as to bind the Company, and the Company refused to perform it, an action for damages was an enforcement of the contract, not a rescission of it. The equitable relief of having the bonds sold to pay such damages as might be awarded was also quite legitimate. (*Vaupell* vs. *Woodward*, 2 *Sandf. Ch.*, 143.)

(4.) But the Judge also wondered that a vendor suing a purchaser of iron could recover damages without having delivered any iron.

The damages awarded by the Referee were indeed large, in figures. They were awarded on the theory that the contract was in fact for three thousand tons of iron, and that at the time of the trial it could be delivered at about $15 a ton below the contract price. If the Referee was in error in treating the contract as binding for more than one thousand tons, still the damages would have been $15,250. (*Fol*. 128–9.) The bonds were by the judgment of the Court sold to pay the damages, bringing $13,050. (*Fol*. 134) or $12,395 86 after deducting expenses. (*Fol*. 135.) There would still have been a deficiency, therefore, had the judgment been for the smaller damages. The contract price for the iron was a high one as the market stood, but the contract was to run for a considerable period, the railroad was just begun and the Company had nothing to buy with, except its State bonds. The cash price for iron was alleged in the Companys answer to be $47, and found by the Referee at $44 75. In this view the contract was a better one for the Company than selling its bonds at 60 and buying for cash, as the arrangement contemplated creating a market abroad for the bonds among the manufacturers of rails.

But whether the contract was a wise one or not, the State Court held it valid, and applied the usual rule of damages. The same rule would have been applicable against the vendors had iron risen above $60, as it has ruled ever since 1862.

(5.) The Court told the jury that the defendants claimed, by that judgment, to recover the damages awarded against the Railroad Company, $50,481 92, *and also* the bonds in controversy, $45,000 more—in all $95,000. (*Fols.* 92–3.) This was a mistake; the judgment directed that the bonds should be sold, and the proceeds applied on the damages, treating the bonds as a security for the amount found due. A mortgagee does not claim his bond debt, and also the property mortgaged. He claims his bond to be paid out of the property mortgaged, and judgment only for the deficiency. The bonds in question were, as the record shows, sold by the order of the Court, and the proceeds applied upon the amount of damages as found against the Company, and final judgment entered only for the deficiency, $38,086-06. (*Fol.* 135.)

Instead, therefore, of claiming a judgment of $50,000, *plus* the bonds, the plaintiff claimed his judgment, *minus* $12,395 86 of it paid off and discharged by the bonds.

The form of the action was not indeed common under the old practice, being substantially an equity suit to foreclose a chattel mortgage; the relief asked for was the ascertainment of plaintiff's damages under the contract, and a sale of the bonds towards payment of such damages.

This may be an explanation of this mistake in the effect of the record, but another may perhaps be found in the misconstruction of the contract already alluded to.

(6.) For the Court told the jury, that for $85,000 in bonds, to be delivered by the company, the defendants were to advance $16,000 in money, and furnish iron for *the remainder* of the $85,000. In this view of the contract the Judge was very naturally surprised that for the mere non-acceptance of iron, which, if they had received it, was, with the $16,000, to be paid them in cash, to have only cost them the bonds, a verdict for over $50,000, be-to perform it, an action for damages was an enforcement of the contract, not a rescission of it. The equitable relief of having the bonds sold to pay such damages as might be awarded was also quite legitimate. (*Vaupell* vs. *Woodward*, 2 *Sandf. Ch.*, 143.)

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But this was as complete a misapprehension of the terms of the contract as was possible.

The contract was for 1,000 tons of iron at $60 per ton, to be paid for, not in bonds, but in cash, on delivery, with the option on the part of the vendor, of making it a contract for 3,000 tons.

(7.) The result of admitting the record as evidence for the jury was that Coddington & Co., whose offence was that they had made with the president of a Railroad Company a contract which they knew was binding on themselves, and supposed was binding on the Company, and had, when the Company broke it, resorted to the judicial tribunals for redress, were placed before the jury as in some way guilty of fraud and of enormities shocking to all concerned in the administration of justice. (*Fols.* 88, 91 and 92.)

There was no excuse in the facts for placing Coddington & Co. in that light. They had always claimed that the contract was a valid one, and they appealed to the courts to enforce it.

The Railroad Company pleaded every ground, real or imaginary, that it had, to defeat the suit. There was no pretence that it was not fairly tried and ably defended, and it could only be owing to some misconception of the nature of the contract and of the proceedings in that action that the Court felt justified in holding up, as for punishment and reprobation, acts of the defendants which may safely challenge the most hostile investigation. If the Railroad company had distrusted the Courts of New York, it should, if it had the right to resort thither, have removed the case to the federal tribunals in the first instance, a course which would have been more regular than to try the State Courts first, and then, dissatisfied with the result, arraign their judgment before another Court in the name of a pretended assignee.

X.—But if Hatch, the plaintiff below, was not, as has been argued, in legal privity with the Railroad Company, and so bound by the judgment, then it was important whether he was or not a mere colorable assignee in actual privity; for if he was, in fact, suing for the benefit of the Company, the judgment in the State Court should have been held as conclusive as though the action had been brought in the name of the Company.

The Court told the jury that it did not matter "whether the beneficial interest, in point of fact, was in the Company or in Hatch" (*fol.* 90).

This was error, and is reviewable under the fifth and sixth requests (*fol.* 88), in connection with the charge as made, and the exception, at *fol.* 98-9.

Hatch's title was, under the evidence, a bald pretence. He claimed through an assignment from Rice, the president (*fol.* 12), who, according to the ruling of the Court, had no power whatever over the bonds. Rice, it is true, testified that he was directed by the board to make the transfer, but he said there was no other record of its proceedings than the one before the Court, which showed no such power (*fols.* 66, 74). But it did show, on the contrary, (*fol.* 71) that the forty-five bonds were to be placed "in the hands of a trustee to be converted into money" for the payment of debts, "or that satisfactory guarantees should be given by Chamberlain to Judge Nelson, that the warrants therefor shall be paid within sixty days." That these forty-five bonds were the same as those in question is clear, because the Company had parted with all the rest (*fol.* 93). That the alleged transfer to Chamberlain was without the "satisfactory guarantees," is apparent from the fact that the assignment is dated the 13th May, the date of the resolution, and on the 14th Judge Nelson did not know the bonds had been assigned, but gave an order for them as "bonds belonging to the Railroad Company" (*fols.* 83, 4, 5.) The arrangement with Chamberlain, too, embraced many details, and this relating to the forty-five bonds was but one of them, none of them to go into effect until a contract should be framed in accordance with it, executed by the officers of the Company (*fol.* 72). Yet Rice himself testifies that he went out of the board meeting into a side room with Chamberlain and Hatch, assigned the bonds without receiving any money, took them from Chamberlain on account of a debt of $100,000 to himself and passed them over to Hatch for money owing to him, avoiding an intermediate transfer by making the assignment from Chamberlain directly to Hatch (*fol.* 73). In this manner of disposing of $45,000 of bonds lent by the State to aid in the construction of this road, by the officers of it for their own purposes, the Court below saw nothing to scrutinize, and told the jury they might shut their eyes to it, but was, at the same time, rigid in the extreme in the construction of the powers under which Rice delivered the same bonds to a party contracting with him in good faith for a sale of rails for the road.

That the refusal to charge the sixth request was error. See *Hoyt* v. *Thompson*, 1 *Seld.*, 320, 334-5.

XI.—The Court received and submitted to the jury improper evidence as to damages.

The true rule was the market value at the place of conversion at the time of conversion. (*Smith* v. *Griffith*, 3 *Hill*, 333; *Scott* v. *Rogers*, 31 *N. Y.*, 676). But the highest price down to the time of the trial is not the doctrine of the federal courts.

(1). It was the *market value*, not the value for banking purposes, or in the payment of debts that furnished the true rule of damages.

That a State chooses to authorize banks to issue their own obligations as currency, on depositing to an equal amount securities such as these, is no evidence of their value. With this security, and the responsibility of the banks besides, the currency is frequently worthless. On winding up some of these Minnesota banks, the bonds sold at 16 and 17 cents on the dollar in May, 1860, and 17 cents in September, 1861 (*fols.* 50, 51, 91, 99).

(2.) The value in the payment of debts was equally objectionable. (*Fol.* 91.)

(3.) It was the market value at the place of the alleged conversion, New York, not the market value in Minnesota, that should have been left to the jury.

(4.) No evidence of value prior to October 30th, 1860, the date of plaintiff's demand, (*fol.* 13,) should have been submitted to the jury.

At common law a right of action for a conversion is not assignable so as to sustain a suit in the name of the assignee. Treating the conversion as having taken place at any time prior to the assignment, (May 13th, 1859,) the action should have been brought in the name of the owner at the time of the conversion.

But if it was the bonds that were assigned, not the tort, there was no conversion after such assignment prior to October 30th, 1860. But see *Charge*, *fols.* 91–2, 98; *Exception*, *fols.* 98–9; *Gardner* vs. *Adams*, 12 *Wend.*, 297; *Hall* vs. *Robinson*, 2 *Comst.*, 293; *Tome* vs. *Dubois*, 6 *Wallace*, 548.

Plaintiff lay by from 13th May, 1859, to October 30th, 1860, while his assignors were litigating with the defendants, and gave no notice of his claim, but is allowed the highest value of the bonds and interest.

(5.) The highest value between the time of conversion and the time of trial is only proper where the plaintiff has been diligent in seeking redress. He is not allowed to lie by and speculate on the fluctuations of the market to enhance his damages. (31 *N. Y.*, 676.)

The damages assessed by the jury, under the charge of the Judge, were excessive.

Before defendant ever saw these bonds, Hatch had only succeeded in selling fifteen at 60 cents on the dollar, in February, 1859. (*Fol.* 78.)

In March, Nelson, the vice-president, had authorized Newton to raise $16,000 on 45 of them, say 35½ cents on the dollar, which he had failed to do either in Philadelphia or New York, up to the time the contract was made with defendant. (*Fol.* 27.)

Nelson himself had in April disposed of 40 of them at $16,000, or at 40 cents on the dollar. (*Fol.* 60.)

After this no sale is shown either in New York or Minnesota at more than 25; two public sales by order of the State authorities producing only 16 to 17½.

But upon evidence as to what fifteen of them brought in February, 1859, two months before Coddington & Co. received the bonds, and as to the amount of currency the State allowed to be issued upon them, a verdict was rendered at the rate of 60 cents, and interest from the 7th May, 1859. (*Fol.* 99.)

The exceptions in reference to the question of damages are, to the evidence, (*fols.* 15, 51,) in the request to charge that the jury should disregard all evidence, except that of the market value, and all evidence of market value, except in New York, refused, (*fol.* 98,) and to the instructions as given. (*Fols.* 98–9.)

XII.—The defect in the declaration of not properly averring the citizenship of the parties, on which the jurisdiction of the Circuit Court depended, is fatal on error, and the judgment must on this ground be reversed.

The only statement as to citizenship of plaintiff is in the title to the declaration. (*Fol.* 1, *page* 2.) That this is insufficient, see *Wood* v. *Wagner*, 2 *Cranch*, 9.

But there is nowhere any statement as to the citizenship of the defendants: "when the suit is between citizens of different States the citizenship of the parties (so as to show, not only that they are citizens of different States, but also that one of them is a citizen of the State where the suit is brought) must be stated." *Conkl. Treat.*, 4th *ed.*, 344; *Bingham* v. *Cabot*, 3 *Dall.*, 382; *Capren* v. *Van Norden*, 2 *Cranch*, 9; *Wood* v. *Keene*, 8 *Pet.*, 112; *Jackson* v. *Ashton*, *id.*, 148; *Piquiquot* v. *Penn. R. R. Co.*, 16 *How.*, 104; *Ohio & Miss. R. R.* v. *Wheeler*, 1 *Black.*, 286; *Barney* v. *Baltimore City*, 6 *Wall.*, 280.

For this cause, as well as upon the merits, the judgment should be reversed.

S. P. Nash,
Wm. M. Evarts,
Counsel.

Supreme Court of the United States.

THOMAS B. CODDINGTON,
Plaintiff in Error,
versus
EDWIN A. C. HATCH.

Argument for Defendant in Error.

EDWARD H. HAWKE,
Counsel for Def't. in Error,
7 Wall street, New York.

New York:
EVENING POST STEAM PRESSES, 41 NASSAU ST. COR. LIBERTY.
1869.

Evening Post Steam Presses, cor. Nassau and Liberty Sts., N. Y.

Supreme Court 1

OF THE UNITED STATES.

Thomas B. Coddington,
Plaintiff in Error,
vs.
Edwin A. C. Hatch.

I.—This was an action of trover brought in the Court
below by the defendant in error, to recover 45 Minnesota
State bonds, for $1,000 each, dated 3d February,
1859, with interest, payable half yearly on the 1st of
June and December, at the rate of seven per cent.
per annum; principal payable 1st December, 1883.
These bonds were assigned by the Minnesota and Pacific 2
Railroad Company to Selah Chamberlain, who assigned
them to the defendant in error. (Folio 12, 13.)

II.—The declaration avers that on the 13th of May, 1859, the plaintiff in error converted the said 45 bonds to his own use, and that although requested, said plaintiff refused to deliver the same to the defendant aforesaid.

III.—The defendant pleads the general issue.

IV.—The cause was tried before the Hon. Judge Nelson, on the 12th of April, 1866, and resulted in a

3 verdict for said defendant; the jury assessing the damages on the basis of sixty cents. on the $45,000 bonds; equal to $27,000 with interest from May, 1859. A motion was made for a new trial and refused, hence the writ of error.

V.—The bonds in question belonged to the Minnesota and Pacific Railroad Company, and were delivered by the Acting President to one William H. Newton, on the 18th of March, 1859, with written instructions to borrow upon them $16,000 in money, and pay the interest coupons upon the first mortgage bonds of the Company, due in New York 1st April following.

The instructions and Newton's receipt are as follows:

4 OFFICE OF THE MINNESOTA & PACIFIC RAILROAD COMPANY.
ST. PAUL, March 18th, 1859.

WILLIAM H. NEWTON, Esq.:

I authorise you to borrow, upon $45,000 of Minnesota State Railroad Bonds deposited with you, $16,000 in money, and pay the interest coupons upon the first mortgage bonds of the Minnesota and Pacific Railroad Company, which are due upon April 1st, in New York City, upon the presentation at the bank at which they are made payable.

(Signed) R. R. NELSON,
Acting President M. & P. R. R. Co.

5

OFFICE OF THE MINNESOTA & PACIFIC RAILROAD COMPANY,
ST. PAUL, 18th March, 1859.

Received of R. R. Nelson $45,000 State of Minnesota Railroad Bonds, to be used as per instructions in letter of this date, for payment of interest coupons on first mortgage bonds of the Minnesota & Pacific Railroad Company, due April 1st, 1859. 6

(Signed) Wm. H. Newton.

(Folios 27–28.)

VI.—These bonds were received by Newton under said letter, "no other way," as stated by him in his evidence (folio 28), and Newton placed them in Coddington's safe three, four or five days before the 21st of April, 1859, where they remained until the contract hereinafter stated was signed. 7

The only power confered upon Newton or upon any one else, with reference to these 45 bonds, is contained in the writton instructions of the 18th March, of the Acting President of the Railroad Company, who received the bonds from the State, and delivered them to Newton to borrow on them $16,000 for the specific purpose fifthly above mentioned, and not otherwise.

VII.—Soon after these bonds had been thus deposited, Newton, with the intention of transferring them to the plaintiff in error, communicated to Mr. Rice, the President of said Railroad Company, a proposition from Coddington (folio 28), which resulted in a contract dated 21st April, 1859 (folios 18 to 23), and which contract was delivered conditionally, as will be shown in its proper order, and is in substance as follows: 8

VIII.—Agreement dated 21st April, 1859, between Coddington & Company and the Minnesota & Pacific Railroad Company. Coddington & Co. agree to sell and the Railroad Company to buy, 1,000 tons railroad iron at $60 per ton, cash on delivery. 9

Coddington & Company to loan and advance to said Railroad Company $16,000 to aid the Company in the construction of its road, for which the notes of the Company were to be given, payable in six months with interest.

The Company to deposit with Coddington & Company

10 $85,000 Minnesota State bonds as security for the loan
and the performance of the contract. Coddington & Co.
to negotiate and make sales of the said bonds, or purchase iron with them. The 1,000 tons to be delivered
by 1st July, 1859, to the Railroad Company on being
paid for by the Company. Coddington & Co. having
the option to store it in New York or forward it to Milwaukie or St. Paul, at the Company's risk. Coddington
& Co. retaining title to the iron until the Railroad Company received and paid for it.

11 That in the event of the Railroad Company not being
able to receive and pay for the said 1,000 tons iron
within four months after the time specified for its delivery, say on or before 1st November, 1859, Coddington
& Co might sell the said iron either at public or private
sale for the account of the Railroad Company. That
upon the non-payment of the notes given for the $16,000,
Coddington & Co. might sell the $85,000 of State bonds
or sufficient to reimburse them for the loan, and for any
deficiency between the amount realised for said iron in
12 such re-sale and the contract price.

That Coddington & Co. should have the privilege of
furnishing 2,000 tons more iron, viz., 1,000 tons, 1st
August, 1859, and 1,000 tons in the spring of 1860, provided they gave notice on or before the 1st of July, 1859,
and 1st January, 1860, that they elected to deliver the
additional two thousand tons, in the event of their taking their option the Railroad Company were to deposit
more bonds, the amount to be satisfactory to Coddington & Co., but not to exceed $75,000 of bonds for each
13 1,000, tons of iron.

That William H. Newton should be sent to Great
Britain to aid on the part of the company in the negotiation of the bonds, and that Newton should have authority on the part of the Railroad Company to fix a price
at which Coddington & Co. might take the bonds themselves as cash.

The contract states that it is executed by the Minnesota and Pacific Railroad Company, by their president

duly authorized by resolution of the Board of Directors 14
of said company by Edmund Rice, president, and the
contract is signed by T. B. Coddington & Co.

IX. This contract, the promissory notes for the loan and the letter of the 21st April (folio 23), were prepared by Coddington & Co., and sent to Mr. Rice, the president of the Minnesota and Pacific Railroad Company for signature, who was and for two weeks previous had been lying ill at the St. Nicholas Hotel in New York, and up to this time Mr. Rice had never seen Coddington, nor any one of the firm of Coddington & Co., nor any one on their behalf except Newton. (Folio 28.) 15

X. That prior to the execution of the said contract, Mr. Rice informed Newton, and desired him to state to Coddington & Co. that he, Rice, had no power or authority to execute such a contract, and to guard against any error or misunderstanding in the premises, Rice sent to Coddington & Co. a copy of the resolution of the 13th July, 1858, defining his powers, and Coddington & Co. cannot now plead ignorance nor deny the fact, for it is specially referred to and mentioned in their con-
tract (folio 23), and it is in evidence that Newton con- 16
ducted the negotiations, and Mr. Rice stated to Newton that neither of them had any power to deliver the bonds under the contract, nor make such a contract as the one in question.

Folios 57, 58, 59.

XI.—The only authority conferred on Rice by the Minnesota and Pacific Railroad Company, is contained in the resolution of the 13th July, 1858 (fol. 62, 63), and which is
referred to in the contract, and is the resolution, and the 17
only one from which Rice's authority is derived. By the terms of it he is empowered to sell, loan or otherwise dispose of the *first mortgage bonds of the Minnesota and Pacific Railroad Company*, not the bonds of the State of Minnesota, such as are mentioned in the contract, and

18 which were not in existence until the next year. (See date of bonds 3d Febrnary 1859, fol. 25.)

By the contract Rice pledges the State bonds, and promises to pledge more, and permits Coddington & Co. to sell the bonds before anything is due by the company, or purchase iron with them, *or take the bonds at such price as should be fixed by Newton*, besides sending Newton to Europe at the expense of the company.
(Folio 22.)

19

The letter of the 21st of April, 1859, which was prepared by Coddington & Co. and sent with the contract for Rice's signature, says, " I hand you by Mr. Newton $45,000 of Minnesota State bonds, &c."—but this simply means that the bonds will be delivered by Newton, who then had them in Coddington & Co's store, 76 Broad street, and they were there at the time the contract was signed, in a package in Coddington's safe.
(Newton's evidence, fol. 26.)

20 It is not pretended that Rice had any express power to bind the company to deposit with Coddington & Co. $85,000 of State bonds, nor to agree that the company should deposit $150,000 more in case Coddington & Co. should elect to deliver the 2,000 tons of iron additional.

It is proved expressly, that Rice had no power or authority from the railroad company to deliver these bonds to any one. He says, in answer to the question :

" Had you any power or authority from the railroad
21 company to deliver these bonds to any party ?" He says :

" I had no power and did not profess to have any, quite the reverse ;" he further says :

" I told Mr. Newton that neither of us had any power to make the contract, I handed him a certified copy of the resolution of July 13, 1858, authorizing me to dispose of the first mortgage bonds of the company, which I asked him to show Coddington, or deliver to him to satisfy Coddington & Co. what authority, what confidence the company had reposed in me; I further stated that if the forty bonds had not been disposed of the company would undoubtedly ratify the contract, if they had been disposed of the company could not ratify it." 22

(Folios 58, 59.

The company only had $85,000 of State bonds at this time, and they were never in Rice's possession except to endorse.

Folios 57, 65. 23

XII. Rice had no legal power to make the contract, to sell, pledge or negotiate these forty-five State bonds, and Coddington & Co. are chargeable with notice of Rice's want of authority; they had a certified copy of the resolution defining his powers, and as already stated, it is referred to in the contract.

Story on Agency, 62, 21, 63 to 67.
Dealfield *v.* Illinois, 8 Paige, 527, 2 Hill, S. C. p. 159. 24

Newton had no authority, he was entrusted with these bonds for a special purpose, his authority was limited, and he could not bind the company by any act in which he exceeded his authority.

It is an elementary principle that no man can be bound by the act of another in relation to his property, unless he has deputed him to act for him, nor can he be bound then if his agent acts beyond the scope of his authority. 25

Comyn on Contracts, page 240, 3 T. R., 757, 1 Esp. N. P. R., p. 111.

Nor had Rice authority with Newton's assent to pledge these bonds with Coddington & Co., the utmost Newton had power to do was to pledge them for the loan of the $16,000, under the written instruction re-

26 ferred to, (fol. 27) to be used by him to pay the interest
coupons on first mortgage bonds of the railroad company,
due 1st April, 1859, in New York; he could not
couple the loan with an agreement to purchase iron,
etc., etc.

Nor could Rice and Newton unite their powers under
one agreement and thus bind the company, more especially
when, as in this contract, each portion of it is
conditional, dependent upon, and forms a part of all
the other conditions as a whole ; besides, it was not disputed
27 on the trial that Newton had no power to bind
the company under the contract, and certainly Rice had
no power to pledge the bonds, as Coddington & Co. well
knew, and they could not be in any better position than
Newton, and his delivery to them in violation of his authority,
and Coddington & Co. taking the bonds, was
under the circumstances, a conversion.

XIII. The contract does not refer to or mention
these 45 bonds specially delivered to Newton. It states,
in terms, that the Railroad Company "agree to deposit
28 with Coddington & Co., forthwith, $85,000 of Minnesota
State bonds, as a security for the loan of $16,000, and as
a security for the performance of this contract;" and
Coddington & Co. are authorized to negotiate or use *the
said bonds*, or use them in the purchase of iron. (Folio
18.) This only refers to the 1,000 tons of iron to be
delivered 1st July. Now Coddington & Co. pretend
that the Company only fulfilled a part of their contract,
by the president's "handing them, by Newton, $45,000 of
29 State bonds ;" in other words, that they received, at the
time the contract was signed, $45,000 of State bonds
from the Railroad Company, through Rice; and it is a
significant fact that they should so receive them and not
refer to it in the contract. According to their own
showing, the Company were not to deposit with them
$85,000 forthwith, for if Rice had authority to hand
them, and did hand them, $45,000, parcel of the $85,000,
they could not claim more than the difference; and the

contract, on its face, imports a future delivery as to the 30
whole 85 bonds, and in this view corroborates the evidence of Mr. Rice that it was a conditional delivery.

The letter sent to him, as prepared by Coddington & Co., cannot alter the contract, notwithstanding the words therein, "I hand you, by Mr. W. H. Newton, $45,000 Minnesota State Bonds." Both Coddington and Newton knew very well that these identical bonds were then, and for a long time previous, had been in Coddington's possession for safety. 31

It is submitted that the contract did not intend to apply to the 45 bonds of the Company deposited in Coddington's safe by Newton, and that the letter was a device by Coddington & Co. to get them into their possession and hold them under color of title, with a view of ultimately appropriating them to their own use, and that such was their intention may be fairly inferred from what was done by them in the premises subsequently.

Newton swears that he went to Coddington's office and there delivered the bonds. 32

If, when the contract was in course of negotiation, it had been understood that these 45 bonds were to be deposited, it would have recited that the Company had deposited $45,000 of State bonds on the contract, and had agreed to deposit $40,000 more forthwith.

XV. It is contended that although the contract in question was not originally binding upon the railroad company, yet that it is now binding by reason of a resolution passed by the directors of the company, and adopted May 17, 1859, as follows: 33

SECRETARY'S OFFICE, MINNESOTA AND PACIFIC
RAILROAD COMPANY,

St. Paul, May 17, 1859.

At a meeting of the Board of Directors of the Minnesota and Pacific Railroad Company, held in St. Paul, May 13, 1859, the following resolution was unanimously adopted:

34 *Whereas*, circumstances have arisen in the affairs of this company, whereby it has become impossible to comply with the terms of the contract made by the President thereof on behalf of the Company, with T. B. Coddington & Co. of the City of New York, under date of April 22, 1859, therefore

Resolved, That Wm. H. Newton, Esq., be, and he is hereby authorized to proceed to New York and procure a surrender of said contract and a return of the 45
35 Minnesota State Bonds transferred to Messrs. Coddingten & Co., upon such equitable terms as may be agreed upon.

Signed,

T. M. METCALF,
Secretary.

Folio 32, 33.

This resolution was passed at Newton's solicitation, he having stated at the meeting, and as he himself testified, had frequently stated that there would be no difficulty
36 in getting Mr. Coddington to return those bonds. He says: "I presume I was selected to go to New York, because of my statement that there would be no difficulty in getting Mr. Coddington to surrender the bonds." (Folio 35.)

Mr. Rice testifies that at the time the resolution was introduced at the meeting of the board, Newton stated to the board that Coddington & Co. would make no claim to the bonds or to the carrying out of the contract, and as he had conducted all the negotiations with them,
37 he desired to return to New York for the purpose of getting the bonds on behalf of the Company and that he could do so. Some one suggested that Mr. Coddington had been put to trouble in drawing the contract, Newton said he would make no claim to compensation, the directors, however, expressed a willingness to remunerate him for his trouble if he claimed it, and authorized Newton to offer such remuneration. (Folio 60, 61.)

Mr. Rice saw Coddington in the fall of 1859, and explained to him all that Newton said to the board of directors

when the resolution was passed and why it was placed in 38
the form it was; he, Rice, wanted a return of the bonds; that as Newton negotiated the contract, all that Rice or the Company knew of it, of their understanding, was through Newton, and that if he, Coddington, understood it as Mr. Rice and the Company had been led to understand it there was no reason why he should not surrender the bonds and give up the contract.

Coddington did not deny the facts as stated by Mr. Rice, but wished the question left to some merchant, to which Mr. Rice replied that there was really nothing to refer if he understood the contract, the conditions on
which it was delivered, as Rice did and as the Company 39
did. Mr. Rice then stated that he would bring Newton to Coddington and talk the matter face to face and see if they understood it alike. Coddington inquired at parting if he Rice would return, Rice said he would and bring Mr. Newton. That same evening Rice was served with judicial process at the suit of Coddington & Co. (Folios 74, 75.)

Mr. Hatch also testifies that Newton desired to go himself to Coddington for the purpose of getting the bonds returned. (Folio 79.)

40
Mr. R. R. Nelson testified that he was present at the meeting of the board of 13 May, and at some of the previous meetings, that Newton was there and there was a great deal of discussion about the resolutions of May 13; that Newton stated openly in the board that if the resolutions passed and he was sent to New York he could obtain from Mr. Coddington the surrender of the contract and the bonds; that he had been engaged in business matters with him and that he was an old friend. This he stated openly to the board and had stated previously to me. Mr. Nelson says, "I voted for the resolu-
tions on that statement, I didn't like the phraseology of 41
them exactly but on his statement I voted for them." (Folios 82, 83.)

This resolution is clearly no ratification of the contract, it only amounts to a direction or private instruction

42 to an officer of the company. It states in terms that the contract made by Rice cannot be carried out; it was passed at Newton's solicitation; he knew under what circumstances the contract and bonds were delivered, and if he was selected as the agent, he would get them returned.

The company wanted an amicable arrangement of the matter. It is impossible to imagine that they intended anything more by the resolution. Had they desired to confirm the contract, they would simply have
43 said so, not, that it was impossible to carry it out. They well knew that it was wholly out of their power to carry out the contract, and the evidence, as above set forth, shows conclusively that the company had neither the power nor the intention to ratify it..

Besides, the resolutions of the 13th May were passed *subsequent* to the assignment of these forty-five bonds. (Folio 75.)

Hatch claims title to these bonds through Chamberlain (fols. 12, 13), and the passing of the resolutions,
44 *after* the company were divested of their title, could not in any way affect the rights of the assignees. Still it is contended that in any view of the matter, and for the reasons stated, the resolutions cannot be fairly construed into a ratification of the contract,

Again in the trial on the Court below, the counsel for Coddington contended that the resolution of the 13th May, 1859, was a ratification of the contract by the company.

45 This is evidently an after-thought, for Coddington on the 29th November, 1859, swore that the company utterly renounced the contract, and refused to perform it in any particular.

XVI. It was proved on the trial that the contract was delivered conditionally; that it was not to take effect unless it was approved of by the Board of Directors of the company; nor if the acting President had disposed of forty bonds supposed to be in his possession. (Folio 57.)

46 After the contract was signed and delivered, as aforesaid, Messrs. Rice and Newton left New York for St. Paul, and arrived there on the 28th or 29th of April, 1859, and were informed by the acting president that he had disposed of the forty bonds to raise $16,000 to pay interest.

The next day, 30th April, Rice, by post, notified Coddington & Co. how matters stood, and informed them that the company could not carry out the contract.

On learning of the company's inability to perform the agreement, Coddington & Co., by letter, dated 28th 47 June, 1860, notified the president that they elected to make the contract one for 3,000 tons of iron deliverable as expressed in the contract. Coddington & Co. sued the company for breach of contract; the matter was left to a referee, who awarded Coddington & Co. $50,481.92 damages, exclusive of costs. Coddington took the bonds to the Merchants' Exchange, and they were sold by the Referee's order December 1st, 1860, and realized $12,395 86, Coddington being the purchaser of all but five. 48

XVII. The undisputed facts in the case show that for at best a technical breach of contract, Coddington & Co. obtained a judgment against the Railroad Company for $50,481.92; that the $45,000 of bonds were taken to the Merchants' Exchange by Coddington and sold, he being the purchaser of all but five—$45,000 on which there was interest due on the day of sale (1st December, 1860) $5,861; that the costs and expenses amounted to 49 $654.14, amounting in the aggregate to $101,997.06, on which Coddington gives a credit on the judgment of $12,395.86, leaving the Company minus $89,601.10; and this for a nominal breach of a contract which the jury found was delivered conditionally, and under which contract Coddington & Co. claimed to hold the State bonds. The contract in question is dated April 21, 1859. Rice's letter notifying Coddingto & Co. that then contract could not be carried out, is dated 30th April, 50 1859—and allowing seven days for it to reach New York, only about sixteen days had elapsed from the time of such conditional delivery of the contract—and it was not denied by Coddington & Co. on the trial, and the facts were proved :

That Coddington & Co. had never purchased any iron for the Railroad Company under the contract.

That no liability of any kind for iron had been incurred by them under the contract.

That no iron was ever tendered, resold, or delivered
51 by Coddington & Co. to the company.

That no money was paid out for iron by Coddington & Co. under the contract for the company.

That the $16,000 mentioned in the contract was never paid by Coddington & Co., nor any portion of it, nor was auy money in any way ever paid to the company.

That nothing of value, no consideration whatsoever, has ever been given by Coddington & Co., or by any one in their behalf, to the company for the $100,000 and over, which Coddington & Co. claim a right to, and
52 for which they have litterally paid nothing.

XVIII. The learned Judge who tried the cause left the question of Rice's authority to pledge these bonds, and the question of the conditional delivery of the contract, &c., to the jury, and upon the evidence they found a verdict for the plaintiff for the value of the 45 bonds at 60 cents on the dollar.

The only error, if any was it is submitted, in the jury's not finding a verdict for the plaintiff for the par value of
53 the bonds, for it was proved that in St. Paul they were used for banking purposes at 95 cents, and passed freely there in payment of debts at par.

The defendant in error asks that the writ of error be dismissed, with costs, &c.

E. H. Hawke,
Counsel and for Deft. in Error.